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Kansas v. Hendricks: Marking the Beginning of a Dangerous New Era in Civil Commitment

Kimberly A. Dorsett

KANSAS v. HENDRICKS: MARKING THE BEGINNING OF A DANGEROUS NEW ERA IN CIVIL COMMITMENT

> This law reflects confused thinking . . . . They make today's mental health providers and psychiatric hospitals into tomorrow's wardens and jails.[1]

INTRODUCTION

The nation gasped in horror over the story of Earl Shriner.[2] Shriner was a repeat sex offender, who began his life of violent crimes at sixteen when he killed a schoolmate.[3] After his release from a mental institution, Shriner then kidnapped and assaulted two teenage girls.[4] While serving his sentence for those crimes, Shriner disclosed to a cellmate that he wanted a van equipped with cages so that he could capture, molest, and kill children.[5] Eager about his pending release from prison, Shriner began a diary that carefully outlined his plans for the torture and murder of children.[6] Although the state wanted desperately to involuntarily commit Shriner, current laws in the state did not allow it because he was not mentally ill and had not recently committed an overt act.[7] After the state reluctantly released Shriner, he committed his most brutal crime on an innocent seven-year-old boy who was riding his bike near his home in Tacoma, Washington.[8] Shriner kidnapped him, raped him, strangled him, and severed his penis.[9]

Recent media attention over heinous crimes by sex offenders such as Shriner have roused feelings of rage and hatred for sex offenders. As a result, demands from people nationwide have compelled several states to enact legislation allowing for involuntary civil commitment of sexually violent predators, even after they have fully served their

1. Stephen Lally, *Steel Beds v. Iron Bars: New Laws Muddle How to Handle Sex Offenders*, WASH. POST, July 27, 1997, at C1.
2. Barry Siegel, *Locking Up Sexual Predators*, L.A. TIMES, May 10, 1990, at A1.
3. *Id.* at A30.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. Siegel, *supra* note 2, at A1.
9. *Id.*

criminal sentences.[10] In 1994, Kansas joined those states by enacting the Sexually Violent Predator Act ("SVP Act").[11] While many argue that such commitment schemes are necessary to protect communities from these predators,[12] the constitutionality of these acts is still highly scrutinized.[13]

The most recent constitutional challenge came before the United States Supreme Court in *Kansas v. Hendricks*.[14] This Note analyzes that controversial decision in four parts. Part I discusses the history of sexual predator laws and summarizes the history of the Kansas statute.[15] Part II explains in detail the Court's decision in *Kansas v. Hendricks*.[16] Part III analyzes and critiques the justifications advanced by the Court in its decision to uphold the Kansas SVP Act as it applied to Leroy Hendricks.[17] Finally, Part IV assesses the impact this case will have on both the legal and mental health communities and on sexual predators who will be confined under these statutes in the future.[18]

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10. ARIZ. REV. STAT. ANN. § 13-4601 to 13-4614 (West Supp. 1997); CAL. WELF. & INST. CODE ANN. § 6600-6603 (West Supp. 1997); COLO. REV. STAT. § 16-11.7-101 (Supp. 1997); CONN. GEN. STAT. § 17a-566 (Supp. 1997); FLA. STAT. ANN. § 775.21(1-9) (West Supp. 1997); 725 ILL. COMP. STAT. ANN. § 205/0.01 (West Supp. 1997); IOWA CODE ANN. § 901A (West Supp. 1997); MASS. GEN. LAWS ANN. ch. 123A (West Supp. 1997); MINN. STAT. ANN. § 253B.185 (West Supp. 1997); NEB. REV. STAT. § 29-2923 (West 1997); N.J. STAT. ANN. § 30:4-82.4 et seq. (West 1997); N.M. STAT. ANN. § 43-1-1, 13 (Michie 1993); OR. REV. STAT. § 426.080, .090, .095, .100, .110, .120 (1995); TENN. CODE. ANN. § 33-6-301 (Supp. 1997); UTAH CODE ANN. § 77-16-1 (Supp. 1997); WASH. REV. CODE ANN. § 71.09 (West Supp. 1997); WIS. STAT. ANN. § 980.01 (West Supp. 1997).

11. KAN. STAT. ANN. § 59-29a (West Supp. 1996).

12. *See* John Kip Cornwell, *Protection and Treatment: The Permissible Civil Detention of Sexual Predators*, 53 WASH. & LEE L. REV. 1293, 1336 (1996) (maintaining that sexual predation is a noxious problem and sexual predator laws are a constitutional way to protect the public); Nathaniel L. Taylor, *Abuse of Judicial Review: The Unwarranted Demise of the Sexually Violent Predators Statute By* Young v. Weston, 71 WASH. L. REV. 543, 570 (1996) (emphasizing the extreme need for civil commitment statutes in order to protect communities); Juliet M. Dupuy, Comment, *The Evolution of Wisconsin's Sexual Predator Law*, 79 MARQ. L. REV. 873, 892 (1996) (arguing that sexual predator laws are a very effective way to reduce sexually violent crimes).

13. Robert Marquand, *Court Lowers Wall Dividing Church, State . . . Elevates Public Safety Over Predator's Rights*, CHRISTIAN SCI. MONITOR, June 24, 1997, at 1, 18; John P. Zanini, *Considering* Hendricks v. Kansas *for Massachusetts: Can the Commonwealth Constitutionally Detain Dangerous Persons Who Are Not Mentally Ill?*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 427 (1997) (analyzing the Kansas Supreme Court decision and attempting to predict the outcome at the Supreme Court level); Sarah H. Francis, Note, *Sexually Dangerous Person Statute: Constitutional Protections of Society and the Mentally Ill or Emotionally-Driven Punishment?*, 29 SUFFOLK U. L. REV. 125 (1995); Editorial, *The High Court's Mixed Record: Wrong on Sex Offenders*, N.Y. TIMES, June 24, 1997, at A18; Gina Kolata, *The Many Myths About Sex Offenders*, N.Y. TIMES, Sept. 1, 1996, at E10.

14. 117 S. Ct. 2072 (1997).

15. *See infra* Part I.

16. *See infra* Part II.

17. *See infra* Part III.

18. *See infra* Part IV.

I. BACKGROUND

A. *History of Civil Commitment Laws*

In the late 1930s, legislatures began enacting "sex psychopath" statutes, which were designed to divert sexually dangerous offenders from the criminal justice system to the mental health system.[19] These offenders were confined until they either fully recovered or were no longer considered a menace to society.[20] By 1960, twenty-six states and the District of Columbia had enacted their own "sexual psychopath" statutes, under which the offenders would be involuntarily committed and treated after their conviction rather than punished by a traditional prison sentence.[21] By the 1980s, however, pressure from the growing civil rights movement and concerns over the ability of the mental health professionals to predict dangerousness and to effectively treat sexual predators prompted many states to repeal their sexual psychopath statutes.[22] By 1990, nearly half of the states had abolished them.[23] While no longer referred to as sexual psychopath statutes, states have been reviving and enacting new forms, commonly referred to as sexual predator statutes or sexually dangerous offender statutes.

B. *The United States Supreme Court's Reaction to Civil Commitment Laws*

The legislators of the states that ultimately repealed their sexual psychopath statutes were not the only people who questioned their constitutionality. The Supreme Court had been addressing those issues as far back as the 1940s, beginning with *Pearson v. Probate Court*.[24] In *Pearson*, the Court upheld Minnesota's psychopathic personality statute against due process and equal protection challenges and unanimously rejected that a "habitual course of misconduct in sexual matters," an "utter lack of power to control . . . [their] sexual impulses," and a likelihood "to attack or otherwise inflict injury, loss, pain, or other evil" were unconstitutionally vague and further held that a state may single out persons for harsher treatment upon a de-

19. Raquel Blacher, Comment, *A Historical Perspective of the "Sex Psychopath" Statute: From the Revolutionary Era to the Present Federal Crime Bill*, 46 MERCER L. REV. 889, 897 (1995).

20. *Id.*

21. *Id.* at 903.

22. Brian G. Bodine, Comment, *Washington's New Violent Sexual Predator Commitment System: An Unconstitutional Law and An Unwise Policy Choice*, 14 U. PUGET SOUND L. REV. 105, 109-10 (1990).

23. *Id.* at 110 n.27.

24. 309 U.S. 270 (1940).

termination that they pose a greater risk of danger to the public without violating equal protection principles.[25] Furthermore, the Court held that a hearing, right to counsel, and compulsion of witnesses on the defendant's behalf satisfied the necessary due process requirements.[26]

In 1966, however, the Court struck down a New York statute that allowed the involuntary psychiatric commitment of prisoners at the end of their prison terms without jury review, rejecting the contention that past criminal conduct was sufficient to support continued commitment without further procedures.[27] The majority also held that in addition to jury review, there must be a judicial determination that the prisoner was dangerously mentally ill.[28] This requirement of dangerousness was later reiterated in *O'Connor v. Donaldson*,[29] where the Court determined that a mentally ill individual may not be involuntarily committed unless that person is also proven to be dangerous and unable to live safely in freedom.[30]

It was not until 1979, in *Addington v. Texas*,[31] that the Supreme Court decided upon the standard of proof required to civilly commit

25. *Id.* at 274.

26. *Id.* at 274-77. Applying a rational basis standard, the Court held that the state had constitutionally selected a smaller class of individuals because of their dangerousness and that protection from those individuals was proper state purpose. *Id.*

27. Baxstrom v. Herold, 383 U.S. 107, 114 (1966). The petitioner in this case was certified as insane by a prison physician while serving his prison sentence. *Id.* He was then transferred to a state hospital under the direction of the Department of Corrections. *Id.* at 107. Upon expiration of the prisoner's sentence, the prison director filed a petition to have the prisoner transferred to a civil hospital for civil commitment. *Id.* The petition was granted, but the prisoner was not given a judicial hearing normally afforded pursuant to the civil commitment statute. *Id.* The Court held that there is no difference between a person nearing the end of a penal term and a person who is not currently imprisoned; therefore, the prisoner is entitled to the same judicial review afforded to persons under the civil commitment statute. *Id.*

28. *Id.* at 110. The *Baxstrom* Court did not explicitly define criteria that must be proven before a defendant is considered dangerously mentally ill, implying that the decision is made by a judge based on the totality of the circumstances. *Id.* at 112-13.

29. 422 U.S. 563 (1975). The petitioner had been confined for almost fifteen years in a state mental hospital. *Id* at 564. He brought an action for damages, alleging that the hospital's superintendent had maliciously deprived him of his right to liberty because he was not mentally ill or dangerous to himself or others. *Id.* at 565. In the alternative, the petitioner argued that if he was mentally ill, then he was deprived of his constitutional right to treatment. *Id.* at 563.

30. *Id.* at 575. The Court did not set forth standards under which a state may confine a mentally ill person, noting it was beyond the scope of the decision. *Id.* at 573. Instead, the Court held that a finding of mental illness alone is not a sufficient basis for civil commitment and that the state, therefore, needed to show that petitioner was dangerous to himself or others. *Id.* at 575. Because that had not been shown, the petitioner was deprived of his right to liberty. *Id.* The Court majority did not, however, address the petitioner's argument that he had a constitutional right to treatment, but the concurrence stated that a person does not have an absolute constitutional right to treatment. *Id.* at 581.

31. 441 U.S. 418 (1979).

an individual for an indefinite period of time in a state hospital.[32] In deciding the issue, the Court assessed both the individual's interest in not being confined indefinitely and the state's interest in committing the emotionally disturbed.[33] Meanwhile, the Court was mindful "that the function of the legal process is to minimize the risk of erroneous decisions."[34] The Court placed great weight on the "adverse social consequences to the individual" and the "very significant impact . . . [that confinement to a mental hospital has] . . . on the individual."[35] Ultimately, the Court held that a state must at least show clear and convincing evidence to civilly commit an individual but added that the state would be free to require a greater showing.[36]

In *Vitek v. Jones*,[37] the Court placed more procedural requirements on the state, announcing that "[n]one of our decisions holds that conviction for a crime entitles a State not only to confine the convicted person but also to determine that he has a mental illness and to subject him involuntarily to institutional care in a mental hospital."[38] A mere finding by the prison psychologist or physician that a mental illness existed was, therefore, insufficient to involuntarily transfer a prisoner from prison to a mental hospital for treatment.[39] Instead, the prisoner was entitled to procedural safeguards such as notice, an adversary hearing, and counsel to contest the transfer decision.[40]

The Supreme Court's practice of granting civilly committed individuals more constitutional rights was cut short in *Allen v. Illinois*,[41] when the Court ruled that civil commitment procedures were not criminal within the context of the Fifth Amendment to the United States Constitution and that due process did not require an independent applica-

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32. *Id.* at 419-20.

33. *Id.*

34. *Id.* at 425.

35. *Id.* at 425-26.

36. *Id.* at 433.

37. 445 U.S. 480 (1980). The appellee was a convicted felon who was transferred from a state prison to a mental hospital pursuant to a state statute that allowed for such a transfer based upon the opinion of the prison psychologist. *Id.* at 480. The appellee filed an action, alleging that absence of adequate notice and judicial review constituted a deprivation of his due process rights. *Id.*

38. *Id.* at 493.

39. *Id.*

40. *Id.* at 483.

41. 478 U.S. 364 (1986). The state had filed a petition against the defendant to have him committed as a sexually dangerous person pursuant to their Sexually Dangerous Persons Act. *Id.* at 366. At a bench trial on the petition, the defendant objected to the use of testimony elicited from him during psychiatric evaluations, alleging a violation of his privilege against self-incrimination. *Id.* The objection was overruled, and the decision to civilly commit the defendant was based in part on the testimony given by the psychiatrist. *Id.*

tion of the privilege against self-incrimination.[42] In determining that the Illinois act was actually civil in nature, the Court emphasized the following features of the Illinois act: that its language stated that it "shall be civil in nature,"[43] the state's disavowed intent to punish,[44] the state's psychological treatment of the individual,[45] and that the system allowed for release after only a brief time in confinement when provided with a proper showing of full rehabilitation.[46] Although this case's holding was limited to the Fifth Amendment privilege, it was easily foreseeable that the Court could extend the holding to other rights normally afforded to criminal defendants.

The last major case to rule on a civil commitment statute before *Hendricks* was *Foucha v. Louisiana*,[47] where the Supreme Court held that an insanity acquittee may be held in a psychiatric facility only as long as the acquittee is both mentally ill and dangerous.[48] The majority explicitly rejected the rationale that "once . . . [the individual] . . . committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, a disorder for which there is no effective treatment, he may be held indefinitely."[49] The Court reasoned that accepting such a rationale "would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct."[50] The State had not contended that the defendant was mentally

42. *Id.* at 375.

43. *Id.* at 368. The Court held that such an expressed statement was an indication of a state's non-punitive purpose. *Id.* The Court did acknowledge, however, that a civil label was not dispositive and added that the defendant was entitled to show the statute had either a punitive purpose or effect. *Id.* at 369 (citing United States v. Ward, 448 U.S. 242, 248-49 (1980)).

44. *Id.* at 370. The state's disavowed interest in punishment was evidenced by the fact that the Act did not promote retribution or deterrence but instead treated prisoners. *Id.* (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963)).

45. *Id.*

46. *Id.*

47. 504 U.S. 71 (1992). The defendant was committed pursuant to a state law that allowed the commitment of insanity acquittees to a psychiatric hospital. *Id.* at 73. According to the procedural requirements of the commitment statutes, after the hospital recommends that the acquittee be released, a trial court must then hold a hearing to determine dangerousness. *Id.* If the trial court finds the defendant to be a danger to himself or others, he or she may be returned to the hospital even absent a finding of mental illness. *Id.* The Supreme Court reversed this decision as a violation of petitioner's due process rights and ruled the state law unconstitutional. *Id.*

48. *Id.* at 77.

49. *Id.* at 82.

50. *Id.* The Court found it especially troubling that the acquittee was further detained based upon a psychiatrist's statement that he would not "feel comfortable in certifying that [petitioner] would not be a danger to himself or to other people," which suggested that the state had not proven dangerousness by clear and convincing evidence. *Id.* at 80, 82.

ill; therefore, the basis for holding him in a psychiatric facility had disappeared.[51]

As demonstrated by this line of cases, civil commitment statutes were first enacted to detain mentally ill individuals. Forty years after the birth of these psychopathic personality statutes, however, the statutes were analogized to another form of civil commitment: pre-trial detention without bail. In *United States v. Salerno,*[52] the Court upheld the refusal of bail to offenders who were believed to pose a risk to society if released.[53] Because society was outraged over the crimes of sexually violent offenders, it pushed for the Bail Reform Act of 1984[54] to deal with the problem of crimes committed by offenders while out on bail.[55] In its decision to uphold the practice, the Court found that detention was merely regulatory and that preventing danger is a legitimate regulatory goal.[56]

The similarities between the Bail Reform Act and sexual predator statutes were readily apparent; procedural safeguards such as a hearing, presentation of witnesses and evidence, and right to counsel were afforded to each defendant.[57] Also, both the Bail Reform Act and sexual predator statutes require a finding of dangerousness before defendants could be detained, and under these statutes, judicial officers are not given "unbridled discretion in making the detention determination."[58] The Court recognized these similarities and partly supported its decision to uphold the practice by citing *Addington*: "We have also held that the government may detain . . . individuals who present a danger to the public."[59] The path that the Court selected in this case disturbed not only numerous pre-trial detainees but also the dissent: "The facts set forth . . . strongly support the possibility that the Government is much more interested in litigating a 'test case' than in resolving an actual controversy . . . [and Justice Marshall's dissent-

51. *Id.* at 78.

52. 481 U.S. 739 (1987).

53. *Id.* at 752.

54. 18 U.S.C. § 1341-1356 (West Supp. 1997). Pursuant to the Act, a court now has the discretion to refuse bail to a prisoner who "may flee or pose a danger to any other person or to the community." *Id.* § 1342(d)(2). The Court may consider the nature of the offense, the weight of the evidence against the person, and the history and physical characteristics of the person in making such a determination. *Id.* § 1342(g)(1-4).

55. *Salerno*, 481 U.S. at 742.

56. *Id.* at 747.

57. *Id.* at 742. *See supra* notes 26-30, 37-40 and accompanying text (discussing procedural requirements afforded to defendants in civil commitment schemes).

58. *Salerno*, 481 U.S. at 742. The Court held that these findings of fact must be proven by clear and convincing evidence. *Id.*

59. *Id.* at 748-49 (citing Addington v. Texas, 441 U.S. 418 (1979)). See *supra* notes 31-36 and accompanying text for a discussion of the *Addington* decision.

ing opinion], and not the Court's, is faithful to the 'fundamental principles as they have been understood by the traditions of our people and our law.'"[60] As the dissent in *Salerno* rightfully feared, the occurrence of the next analogous situation was only a matter of time.[61]

C. *Resurrection of Civil Commitment for Sexual Predators*

As states began to revive their "sexual psychopath" statutes, this trend gave rise to many constitutional challenges. By the time the Kansas Supreme Court was called upon to determine the constitutionality of its SVP Act, many other courts had already made similar decisions. The most publicized cases arose in Washington, Minnesota, and Wisconsin.

In *Young v. Weston*,[62] the U.S. District Court for the Western District of Washington ruled that the Sexually Violent Predator statute was unconstitutional.[63] Young, who was convicted of rape on three separate occasions during a twenty-two year period, was civilly committed as a sexual predator under the Washington statute.[64] After his civil commitment trial, the jury found that he was a sexually violent predator.[65] In his appeal to the Washington Supreme Court, the court found the statute constitutional and upheld his civil commitment.[66] Young then petitioned for a writ of habeas corpus, and the state supreme court's decision was reversed by the district court on several grounds.[67] The district court first determined that a finding of an "an-

60. *Salerno*, 481 U.S. at 769 (Stevens, J., dissenting) (quoting Lochner v. New York, 198 U.S. 46, 76 (1905) (Holmes, J., dissenting)).

61. The movement toward civil commitment of alcoholics has already begun. *See* Douglas H. Olson et al., *A Clinical Tool for Rating Response to Civil Commitment for Substance Abuse Treatment*, 48 PSYCHIATRIC SERVICES 1317, 1321 (1997). The objectives of the study were to assess the patient's response to civil commitment and to identify characteristics associated with a positive response by the patients to the civil commitment. *Id.* at 1317. The subjects of Olson's study were mentally ill alcoholics or patients with both mental and substance abuse disorders. *Id.* The researchers maintained that they found a positive response to treatment following civil commitment. *Id.* The researchers did admit that the sample size was small and that such commitment is very costly. *Id.* at 1322.

62. 898 F. Supp. 744 (W.D. Wash. 1995), *remanded*, 122 F. 3d 38 (1997). This statute, found at WASH. REV. CODE § 71.09, provided the framework for the SVP Act in Kansas. *In re* Hendricks, 912 P.2d 129, 131 (Kan. 1996).

63. *Young*, 898 F. Supp. at 753.

64. *Id.* at 748.

65. *Id.*

66. *Id.* (citing *In re* Young, 857 P.2d 989 (1993)) (holding that the act was civil in nature and required proper evidentiary standards in order to satisfy due process concerns).

67. *Young*, 898 F. Supp. at 752. The court found the statute unconstitutional on three grounds: violation of the substantive due process component of the Fourteenth Amendment; violation of the *ex post facto* prohibition in Article 1, Section 10 of the Constitution; and violation of the Double Jeopardy Clause of the Fifth Amendment. *Id.* at 752-54.

tisocial personality" was not constitutionally sufficient to justify civil commitment because it fell short of the mental illness standard established in *Foucha*.[68] The court next concluded that the statute was criminal rather than civil in nature.[69] In support of its finding, the court noted the potentially indefinite term of the commitment,[70] the application to already criminal behavior,[71] and the implication of retribution and deterrence.[72] The court also cited the apparent lack of concern for treatment, which is indicative of a "keen interest in punishment."[73] The court additionally disagreed with the use of "mental abnormality" as a standard, arguing that the term was not medically recognizable.[74] The district court granted Young's writ of habeas corpus.[75]

The first major case interpreting Minnesota's sexual predator statutes was *In re Blodgett*.[76] The court determined that its predator statute did not violate substantive due process principles.[77] In his argument, Blodgett attempted to use *Foucha*[78] to support the proposition that a state cannot civilly commit an individual absent a finding of mental illness.[79] The court rejected Blodgett's argument, holding that a finding of a psychopathic personality, as required under the statute, was a proper subset of mental illness.[80]

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68. *Id.* at 750. The district court interpreted *Foucha* as requiring a finding of mental illness in order to involuntarily civilly commit an individual pursuant to substantive due process protections. *Id.* at 750-51. *See* Foucha v. Louisiana, 504 U.S. 71 (1992) (holding that mental illness must be shown by at least clear and convincing evidence); *see also supra* notes 47-51 and accompanying text (discussing the *Foucha* decision).

69. *Young*, 898 F. Supp. at 752.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 753. The district court was most concerned by the fact that treatment was delayed until after completion of a prison term. *Id.* It then stated that the delay not only suggested that treatment was a secondary concern but that it also was an unconstitutional deprivation of treatment pursuant to state statute. *Id.*

74. *Id.* at 750. The district court further disagreed with the state's definition of mental abnormality, suggesting that it was a mere tautology. *Id.*

75. *Young*, 898 F. Supp. at 753-54. This decision was remanded, however, in light of the *Hendricks* decision. Young v. Weston, 122 F.3d 38 (1997).

76. 510 N.W.2d 910 (Minn. 1994).

77. *Id.* at 914-15. The version of the statute at issue in both cases may be found at MINN. STAT. ANN. § 253B.02 (West 1992 & Supp. 1997).

78. Foucha v. Louisiana, 504 U.S. 71 (1992). *See supra* notes 47-51 and accompanying text (discussing the *Foucha* decision).

79. *Blodgett*, 510 N.W.2d at 914.

80. *Id.*

An amended version of the statute was upheld in *In re Linehan*[81] against substantive due process, equal protection, double jeopardy, and *ex post facto* attacks.[82] The difference between the psychopathic personality version of the statute as disputed in *Blodgett*[83] and the sexually dangerous person statute disputed in *Linehan* is that the sexually dangerous person statute does not require proof of an inability to control one's sexual impulses.[84] The amended version also describes conduct in which the individual must have engaged and conduct in which the individual is likely to engage.[85]

The Minnesota Supreme Court first agreed with the lower court's finding that "likely" to engage in future sexual conduct was consistent with a clear and convincing evidentiary standard, thereby satisfying due process requirements.[86] Applying a strict scrutiny standard, the court also held that the state has a "compelling interest in protecting the public from sexual assault"[87] and in "the care and treatment of the mentally disturbed."[88] Once the court found that the sexually dangerous personality statute was sufficiently narrow in its application, it held that the statute applied only to those who are "utterly unable to control impulses to sexually assault others."[89] The court next addressed the argument that the commitment standards were medically unsound.[90] The court rejected that argument as well, maintaining that legislatures are allowed flexibility in their definitions and that the sexually dangerous person statute was written under the advice of mental

81. 557 N.W.2d 171 (Minn. 1996), *vacated, In re* Linehan, 118 S. Ct. 596 (1997) (vacating judgment in light of the *Hendricks* decision).

82. *Id.* at 172. The Minnesota legislature met in special session to amend the civil commitment of psychopathic personalities to include "sexually dangerous persons." MINN. STAT. ANN. § 253B.02 (1994) (current version at MINN. STAT. ANN. § 253B.02 (West Supp. 1997)).

83. 510 N.W.2d 910. See *supra* notes 76-80 and accompanying text for a discussion of this case.

84. *Linehan*, 557 N.W.2d at 179.

85. *Id.* A likelihood of future harm is rebuttably presumed for conduct described in criminal offenses such as criminal sexual conduct in the first through the fourth degrees, murder, manslaughter, and kidnapping if those crimes can be shown to have been motivated by sexual impulses. *Id.* at 179 (citing MINN. STAT. § 253B.02, subd. 7a(a) (1995)). This statute shows a further erosion of the dangerousness requirement first articulated in *Baxstrom*. *See supra* notes 27-28 (requiring that there must be a judicial determination that the prisoner was "dangerously mentally ill").

86. *Linehan*, 557 N.W.2d at 180.

87. *Id.* at 181 (citing *Blodgett*, 510 N.W.2d at 914, 916).

88. *Id.*

89. *Id.* at 183.

90. *Id.* at 184. Linehan tried to argue that the basis for his commitment, antisocial personality disorder, was not a sufficient justification and was really nothing more than a "definition of criminal behavior." *Id.*

health professionals.[91] The next issue the court addressed was an equal protection attack, which it rejected using a heightened scrutiny standard.[92] Relying on *Blodgett*,[93] the court found that the state had a genuine interest in protecting the public from a group of sufficiently dangerous individuals.[94] The court rejected *ex post facto* and double jeopardy challenges because it determined that the amended statute was civil in nature.[95] The final issue the court addressed was Linehan's argument that the evidence was insufficient to justify his involuntary civil commitment.[96] The crux of his argument was that a link had not been established between the "likelihood of sexually harmful conduct and his past conduct or his personality disorder."[97] In rejecting that argument, the court looked to the evidence the state presented in its case and argued that there was clear and convincing evidence of a likelihood of future harmful conduct.[98]

In *Wisconsin v. Post*,[99] the Supreme Court of Wisconsin reversed a lower court's decision that the Wisconsin Sexually Violent Person Commitment statute was unconstitutional.[100] In reversing that decision, the court held that the state had shown a compelling state interest in protecting the public from sexual predators and in treating the mentally ill and dangerous.[101] The court also found that the statute was narrowly tailored because it limited commitment only to those

91. *Id.* at 185.

92. *Linehan*, 557 N.W.2d at 185.

93. *In re* Blodgett, 510 N.W.2d 910 (Minn. 1994).

94. *Linehan*, 557 N.W.2d at 186.

95. *Id.* at 188-89. Again relying on *Blodgett*, the court held that neither the psychopathic personality statute nor the sexually dangerous predator statute had punitive effects, as indicated by the emphasis on treatment and lack of a punitive intent by the legislature. *Id.* The court further noted that Linehan had failed to meet his burden of showing that the legislature had a contrary intent. *Id.* at 188.

96. *Id.* at 189.

97. *Id.* at 190.

98. *Id.* The evidence noted by the court was a videotape showing Linehan masturbating after playing with his stepdaughter, which was indicative of his attraction to young girls. *Id.* The court further cited his lack of remorse, his rationalization and tendency to lie about his crimes, and his aggressive actions in treatment. *Id.* The dissent in *Linehan* rigorously disagreed with the majority in several respects, first criticizing it for its over-reliance on *Blodgett*. *Id.* at 191-92. Additionally, the dissent argued that accepting such a finding of a mental disorder substantially erodes both due process and the decision in *Foucha*. *Id.* at 195. The dissent concluded by emphasizing that predictions of dangerousness and the finding of a mental disorder do not satisfy due process requirements. *Id.* at 196-97. The dissenters further stated that committing a person for something she or he might do should never be allowed. *Id.*

99. 541 N.W.2d 115 (Wis. 1995).

100. *Id.* at 118. For a version of the statute analyzed by the court, see WIS. STAT. ANN. § 980 (West Supp. 1996) (current version at WIS. STAT. ANN. § 980.01 (West Supp. 1997)).

101. *Post*, 541 N.W.2d at 118.

who were dangerous and had a mental disorder.[102] As *Linehan*, *Blodgett*, and *Post* demonstrated, the state of civil commitment laws had not been firmly established when the Court decided *Hendricks*.

D. The Kansas Reaction

After the story of Earl Shriner and the seven-year-old boy was broadcast to the public,[103] the Washington State Capitol Building was bombarded with letters, calls, and protest marches demanding tougher laws for sex offenders.[104] Washington soon became the first state to enact the modern version of the sexual psychopath statutes.[105] Kansas responded similarly to public pressure after the rape and murder of Stephanie Schmidt by co-worker Donald Ray Gideon, a man who had been recently released from prison for a previous rape.[106] An *ad hoc* task force formed by the victim's family pushed for passage of the SVP Act and won,[107] making Kansas one of eight states actively enforcing sexual predator statutes.[108]

The SVP Act, which is similar to the act passed in Washington, provides for the civil commitment of persons who, according to the legislative findings, comprise a "small but extremely dangerous group . . .

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102. *Id.* at 122-24. The court dispelled with an analysis of the distinction between mental illness and mental disorder, noting that even the Supreme Court had not articulated a single definition sufficient for civil commitment. *Id.*

103. Siegel, *supra* note 2, at A1.

104. *See id.* at A30. As a public display of their outrage over the crimes committed by Earl Shriner, groups called the "Friends of Diane" and the "Tennis Shoe Brigade" marched to the state capital and dumped thousands of tennis shoes on the steps as a symbol of the children's vulnerability. *Id.* One white pair of shoes had a note attached: "These are the shoes of a beautiful 18-year-old girl who was murdered last summer." *Id.* Holding a pair of red high-top sneakers was the mother of the mutilated seven year-old boy who yelled: "He could be anybody's child. He could be anybody's grandchild." *Id.* Many other people soon joined in the protest, which was eventually labeled as an "unprecedented" display of outrage by the citizens of Washington. *Id.* Mark Appelwick, the chairman of the House Judiciary Committee, described the public mood as "near vigilantism." *Id.* "I feared we'd be forced to do very radical extreme things," stated Appelwick. *Id.* It was under this mood that the Washington statute was passed.

105. WASH. REV. CODE § 71.09 (Supp. 1996-97). The committee that developed the statute knew that it was free to define what constituted mental illness and other diagnostic terms, and thus decided to do so broadly. Siegel, *supra* note 2, at A30. The committee also asked psychiatrists to predict those who would be dangerous in the future, though it discovered through its research that the doctors were wrong in two out of three cases. *Id.* This statute served as the pattern for the Kansas SVP Act. *In re* Hendricks, 912 P.2d 129, 131 (Kan. 1996).

106. Brief for the Respondent at 1-2, Kansas v. Hendricks, 117 S. Ct. 2072 (1997) (No. 95-9075).

107. *Id.*

108. While eighteen states currently have sexually violent predator statutes on the books, at this writing, only eight actively use them: Washington, California, Ohio, Illinois, Kansas, Minnesota, Massachusetts, and Florida. *See supra* notes 10-11. Thirty other states, however, are currently considering similar statutes in light of the *Hendricks* decision. Tom Browell, *Close to Home: A Stronger Megan's Law*, WASH. POST, Sept. 28, 1997, at C8.

[of] . . . predators," who do not have a mental disease or defect but do have "anti-social personality features which are unamenable to existing mental illness treatment."[109] The SVP Act further provides that the "likelihood of engaging in repeat acts of predatory sexual violence . . . [is] . . . high" and "the prognosis for rehabilitating . . . [these] . . . predators . . . [is] . . . poor, the treatment needs of this population are very long term and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the . . . [general involuntary civil commitment statute]."[110]

The SVP Act defines a "sexually violent predator" as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence."[111] "Mental abnormality" is defined as a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others."[112] A "sexually violent offense" includes crimes such as rape, indecent liberties with a child, indecent solicitation of a child, or sexual exploitation of a child.[113]

Armed with its new statute, Kansas applied it for the first time to its own version of Earl Shriner: a sixty-two year-old pedophile named Leroy Hendricks, who had a career of molesting children that spanned three decades.[114]

II. *KANSAS V. HENDRICKS*

A. Facts

In 1984, Hendricks was convicted of taking "indecent liberties" with two thirteen-year-old boys.[115] He served only ten years for this crime instead of a possible life sentence because he accepted a plea bargain from the state.[116] Shortly before his scheduled release, the state of Kansas filed a petition pursuant to its newly enacted SVP Act seeking

109. KAN. STAT. ANN. § 59-29a01 (1996).
110. *Id.*
111. *Id.* § 59-29a02(a).
112. *Id.* § 59-29a02(b).
113. *Id.* § 59-29a02(e)(1-9).
114. *In re* Hendricks, 912 P.2d 129 (Kan. 1996).
115. *Id.* at 137.
116. *Id.*

civil confinement.[117] At his jury trial, Hendricks's own testimony revealed a history of repeated child molestation, which began with him exposing his genitals to two young girls in 1955, for which he received a $2.90 fine.[118] In 1957, he was convicted of lewdness involving a young girl and received a brief jail sentence.[119] In 1960, while working at a carnival, Hendricks seized the opportunity to molest two young boys and served a two year sentence.[120] After serving that sentence, Hendricks was paroled and shortly thereafter molested a seven-year-old girl.[121] Hendricks was then committed to a state psychiatric hospital, where futile attempts were made to treat him; he sexually assaulted an eight-year-old girl and an eleven-year-old boy after being released.[122] Imprisoned again in 1967, Hendricks refused to participate in treatment, and he was forced to remain in prison until his parole in 1972.[123] Hendricks then began to molest his own stepchildren, forcing them to engage in sexual activity over a four year period.[124] His final conviction was for taking indecent liberties with two thirteen-year-old boys, for which he served a ten year prison term.[125] At the conclusion of this sentence, the state moved to civilly commit him as a sexually violent predator.[126]

B. Procedural History

The initial version of the SVP Act as applied to Hendricks required a specific sequence of procedures. First, the custodial agency was required to notify the attorney general at least sixty days prior to the scheduled release of Hendricks under the Act.[127] The prosecutor had to decide within forty-five days to file a petition to the state court seeking Hendricks's involuntary commitment.[128] The court made the determination that "probable cause exist[ed] to believe that . . . [Hendricks was] . . . a sexually violent predator."[129] The judge then di-

117. *Id.* at 130.

118. *Id.* at 130-31; Charles Krauthammer, *Don't Play a Hospital Game With Sex Offenders Hospitals*, NEWSDAY, Dec. 17, 1996, at A42.

119. Kansas v. Hendricks, 117 S. Ct. 2072, 2078 (1997).

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *In re* Hendricks, 912 P.2d 129, 136-37 (Kan. 1996).

126. *Id.* at 130.

127. KAN. STAT. ANN. § 59-29a03 (1996). The current version of the statute requires 90 days' notice. KAN. STAT. ANN. § 59-29a03 (West Supp. 1997).

128. KAN. STAT. ANN. § 59-29a04 (1996).

129. *Id.* § 59-29a05.

rected that Hendricks be taken into custody, where a professional evaluation was made as to the presence of a mental abnormality or personality disorder.[130] After that evaluation, a trial was held, which determined beyond a reasonable doubt that Hendricks satisfied the requirements of the SVP Act.[131] At the conclusion of the trial, Hendricks was found to be a sexually violent predator and was transferred to the Secretary of Social and Rehabilitation Services for "control, care and treatment until such time as . . . [Hendricks's] . . . mental abnormality or personality disorder has so changed that . . . [Hendricks] . . . is safe to be at large."[132] Hendricks appealed his commitment under the SVP Act on substantive due process, double jeopardy, and *ex post facto* grounds.[133]

The Kansas Supreme Court accepted Hendricks's substantive due process claim and ultimately ruled that the act was unconstitutional as a violation of the Fourteenth Amendment.[134] Relying in part on the Court's ruling in *Foucha*,[135] the Kansas Supreme Court ruled that the involuntary commitment of Hendricks absent a finding of mental illness amounted to "a showing of dangerousness without a finding of mental illness," thus violating Supreme Court precedent.[136] The Kansas court's holding centered around its doubts about the legislature's purported reason for committing the sex offenders: "It is clear that the overriding concern of the legislature is to continue the segregation of sexually violent offenders from the public. Treatment with the goal of reintegrating them into society is incidental, at best."[137] The Kansas court further looked for any actual treatment these individuals were receiving with a skeptical eye, noting that the "record reflects that treatment for sexually violent predators is all but nonexistent."[138] The court noted the fact that the Kansas legislature allowed for the commitment of sexually violent predators who were unresponsive to treatment and doubted their actual ability to be cured.[139] In light of its analysis of the facts, the Kansas court ruled that the primary objective of the legislature was to "continue incarceration and not to provide

130. *Id.*

131. *Id.* § 59-29a06(a).

132. *Id.* § 59-29a07(a).

133. Kansas v. Hendricks, 117 S. Ct. 2072, 2079 (1997).

134. *In re* Hendricks, 912 P.2d 129, 138 (Kan. 1996).

135. 504 U.S. 71 (1992). See *supra* notes 47-51 and accompanying text for a discussion of this case.

136. *In re* Hendricks, 912 P.2d at 138.

137. *Id.* at 136.

138. *Id.* At the time Hendricks was transferred to the Larned State Hospital, there was no treatment staff or treatment program in place at the facility. *Id.* at 131.

139. *Id.* at 131.

treatment," which violated Hendricks's substantive due process rights.[140]

Kansas then petitioned the United States Supreme Court for certiorari.[141] In response, Hendricks filed a cross-petition, in which he reasserted his federal double jeopardy and *ex post facto* claims.[142] The Court granted certiorari on both petitions and reversed the decision of the Kansas Supreme Court.[143]

C. *Majority*

Justice Thomas wrote for a five-justice majority and first addressed the issue of substantive due process and the mental abnormality arguments.[144]

1. *Substantive Due Process and Mental Abnormality*

Hendricks argued that the use of mental abnormality as a standard for civil commitment violated his substantive due process rights.[145] The direction that the Court would take on this issue was established early: "Although freedom from physical restraint 'has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action,' that liberty interest is not absolute . . . [and] . . . may be overridden even in the civil context."[146] The Court, citing *Foucha v. Louisiana*,[147] stated that involuntary commitment statutes have been consistently upheld, provided that proper procedures and evidentiary standards were met.[148]

Once those standards were satisfied in Hendricks's case, the Court pointed out that the SVP Act required a finding of dangerousness and proof of a mental abnormality or personality disorder.[149] Together, those two requirements served as an accurate predictor of offenders

140. *Id.* at 137.

141. Kansas v. Hendricks, 117 S. Ct. 2072, 2076 (1997).

142. *Id.*

143. *Id.*

144. *Id.* at 2079.

145. *Id.* at 2076. The core of substantive due process protections lies in the right to be free from governmental restraint. Foucha v. Louisiana, 504 U.S. 71, 80 (1992). See *infra* notes 247-53 for a discussion of substantive due process rights.

146. *Hendricks*, 117 S. Ct. at 2079.

147. 504 U.S. 71 (1992).

148. *Hendricks*, 117 S. Ct. at 2080; *see Foucha*, 504 U.S. at 71-78 (holding that mental illness and dangerousness must be proven for involuntary commitment). For a discussion of *Foucha*, see *supra* notes 47-51 and accompanying text; *see also* Addington v. Texas, 441 U.S. 418, 433 (1979) (holding that findings of mental illness and dangerousness require a showing of at least clear and convincing evidence). *See supra* notes 31-36 and accompanying text (discussing the *Addington* decision and arguments advanced by the Court).

149. *Hendricks*, 117 S. Ct. at 2080.

likely to engage in acts of predatory violence in the future.[150] One of Hendricks's main arguments, however, was that a finding of mere mental abnormality, rather than mental illness, did not adequately satisfy those requirements. The Court rejected that assertion, citing *Heller v. Doe*,[151] *Allen*,[152] and *Pearson* [153] for the proposition that mental illness was not the only standard that would justify civil commitment.[154] The Court then rejected the contention that *Foucha*[155] stood for the proposition that only a finding of mental illness would suffice; instead, any analogous term would satisfy the evidentiary standards as well.[156]

Finally, the Court rejected Hendricks's argument that mental abnormality was not analogous to previously upheld standards.[157] The Court first submitted that even "psychiatrists disagree widely and frequently on what constitutes mental illness." As a result, the legal communities should not be limited to strict standards either.[158] The fact that legal terms of medical significance vary from those used in the medical community is of no significance because "those definitions do not . . . [need to] . . . fit precisely with the definitions employed by the medical community."[159] The Court held that on its face, the SVP Act

150. *Id.* The accuracy of the predictions for dangerousness is important in a substantive due process analysis because the predictions must be accurate enough to narrowly limit the class of persons committed, thereby satisfying strict scrutiny. *In re* Linehan, 557 N.W.2d 171, 180-82 (Minn. 1996).

151. 509 U.S. 312, 314-15 (1993) (permitting commitment upon a finding of mental retardation by clear and convincing evidence and a finding of mental illness beyond a reasonable doubt).

152. 478 U.S. 364, 366 (1986) (permitting commitment upon a finding of mental illness and dangerousness). For a discussion of the *Allen* decision, see *supra* notes 41-46 and accompanying text.

153. 309 U.S. 270, 271-72 (1940) (permitting commitment of an individual with a "psychopathic personality"); *see supra* notes 24-26 (discussing the *Pearson* decision and procedural requirements imposed by the Court).

154. *Hendricks*, 117 S. Ct. at 2080.

155. Foucha v. Louisiana, 504 U.S. 71 (1992). For a discussion of *Foucha*, see *supra* notes 47-51 and accompanying text.

156. *Hendricks*, 117 S. Ct. at 2080.

157. *Id.* The Court furthered its point by explaining that the Court has used a variety of terms to describe the mental states of those individuals civilly committed. *Id.* Those terms include "emotionally disturbed" and "mentally ill," *id.* (citing Addington v. Texas, 441 U.S. 418, 425-26 (1979)); "incompetency," *id.* (citing Jackson v. Indiana, 406 U.S. 731, 737 (1971)); and "some medical justification for doing so," *id.* (citing *Foucha*, 504 U.S. at 88) (O'Connor, J., concurring)). Upon reviewing these terms, it seems that the Court has given itself the authority to justify civil commitment under the most broad medical terms and concepts, despite due process concerns.

158. *Id.*

159. *Id.* at 2081. The Court noted that legal definitions must account for legal ideas such as "competency" and "individual responsibility"; therefore, they cannot exactly mirror medical terms. *Id.*

satisfied substantive due process requirements because pedophilia qualified as a mental abnormality under the SVP Act.[160]

2. *Double Jeopardy and* Ex Post Facto*: The Civil - Criminal Distinction*

The Court next addressed whether the SVP Act was civil or criminal in nature in order to determine if double jeopardy and *ex post facto* protections attached to the application of the SVP Act.[161] Citing *Allen,*[162] the Court stated that this categorization was "first of all a question of statutory construction," where a court must first ascertain whether the legislature intended the statute to establish a civil or criminal proceeding.[163] If such an intent is found, the court ordinarily defers to the legislature's stated intent.[164] Applying those rules, the Court determined that because the Act was placed in the civil codes of the state[165] and because the legislature described the Act as a "civil commitment procedure,"[166] legislative intent to create a civil statute was clear.[167] Acknowledging that a "civil label is not always dispositive,"[168] the Court concluded that Hendricks had failed to meet his burden of showing by the "clearest proof" that "the statutory scheme . . . [was] . . . so punitive either in purpose or effect as to negate . . . [the State's] . . . intention to deem it [civil]."[169]

In his attempt to satisfy his burden of proof, Hendricks first tried to show that the SVP Act implicated the objectives of criminal punish-

160. *Id.* Although pedophilia is recognized as a serious mental disorder in the DSM-IV, the Court did not address the issue of civil commitment based on a mental condition not recognized in the DSM-IV. *See id.* at 2080-81.

161. *Id.* at 2081. The civil - criminal distinction was considered critical to this analysis because *ex post facto* and double jeopardy protections do not apply in non-punitive contexts. *Id.* The *ex post facto* prohibitions of the United States and all state constitutions forbid retroactive application of penal statutes. U.S. CONST. art. I, § 10, cl. 1. The Court has determined that a statute must be a criminal or penal law that applies to events occurring before its effective date and must substantially disadvantage the offender in order to violate *ex post facto* prohibitions. Weaver v. Graham, 450 U.S. 24, 29 (1981). In *Deptartment of Revenue v. Kurth Ranch*, however, the Court rejected the argument that the *ex post facto* and double jeopardy protections only apply in the criminal context. 511 U.S. 767, 781 (1994). Instead, the protections apply to any scheme that is punitive in character, thus making a legislative label of civil or criminal of little importance. *Id.*

162. 478 U.S. 364 (1986). For a discussion of this case, see *supra* notes 41-46 and accompanying text.

163. *Hendricks*, 117 S. Ct. at 2081-82 (citing *Allen*, 478 U.S. at 368).

164. *Id.* at 2082.

165. *Id.*

166. *Id.* (citing KAN. STAT. ANN. § 59-29a01 (West 1994)).

167. *Id.*

168. *Id.* (citing Allen v. Illinois, 478 U.S. 364, 369 (1986)).

169. *Hendricks*, 117 S. Ct. at 2082 (citing United States v. Ward, 448 U.S. 242, 248-49 (1980)).

ment such as retribution or deterrence.[170] The Court disagreed and stated that the Act was not retributive because prior conduct was not used to affix culpability.[171] Instead, prior conduct was used for evidentiary purposes to show a mental abnormality or dangerousness.[172] The absence of a finding of scienter further showed a non-retributive purpose.[173] The Court then stated that the SVP Act did not function as a deterrent because persons suffering from mental abnormalities or personality disorders are not likely to be deterred by the possibility of confinement.[174]

Hendricks further failed to show that the SVP Act was punitive in nature.[175] The Court explained that because a person confined under the Act is subjected to conditions similar to those endured by other mentally ill patients, the state did not show a punitive purpose.[176] The Court supported that finding by citing *Salerno's*[177] proposition that "the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment."[178] Conversely, confinement of dangerous individuals serves as a classic example of non-punitive detention.[179] Hendricks attempted to show a punitive intent on the part of the state by focusing on the potentially indefinite duration of his confinement.[180] The Court quickly rejected the argument, emphasizing that the confinement is only indefinite should the individual not respond to the state's primary objective of treatment.[181]

The next argument that Hendricks advanced was that the similarity between criminal trials and civil commitment trials served as evidence

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170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* The Court did not address at which stage this deterrence rationale is supposed to fit. Applied to Hendricks, the defendant could not have been deterred by this statute because it did not exist when he committed the crimes that lead to his prison sentence. During his prison sentence, the deterrence rationale does not fit because Hendricks did not have the opportunity to have contact with any children, thus there was no potentially harmful conduct to deter.

175. *Hendricks*, 117 S. Ct. at 2082-83.

176. *Id.* at 2082.

177. 481 U.S. 739 (1987). *See supra* notes 52-61 (discussing the arguments advanced by the Court in *Salerno* and noting its similarity to the SVP Act.)

178. *Hendricks,* 117 S. Ct. at 2083 (quoting *Salerno*, 481 U.S. at 746).

179. *Id.* (citing *Salerno*, 481 U.S. at 748-49). The *Salerno* Court gave examples of non-punitive detentions that have been upheld. *Salerno*, 481 U.S. at 748-49; *see* Carlson v. Landon, 342 U.S. 524, 537-42 (1952) (upholding the detainment of potentially dangerous resident aliens during pending deportation proceedings); Ludecke v. Watkins, 335 U.S. 160 (1948) (approving detention of enemy aliens during war); Moyer v. Peabody, 212 U.S. 78, 84-85 (1909).

180. *Hendricks*, 117 S. Ct. at 2083.

181. *Id.*

that civil commitment trials are criminal in nature.[182] Again, using *Allen*[183] as support, the Court maintained that the state's decision to provide some of the safeguards that are applicable in criminal trials did not automatically transform a civil proceeding into a criminal one.[184] Rather, these safeguards merely demonstrated the state's concern for ensuring that only a narrow class of dangerous individuals would be committed using only the strictest procedural standards.[185]

Hendricks's final argument proposed that the lack of legitimate treatment for his purported mental abnormality demonstrated a punitive purpose.[186] Without such treatment, Hendricks argued that his confinement amounted "to little more than disguised punishment."[187] Once again, the Court rejected Hendricks's claims.[188] The Court cited *Allen*[189] for the proposition that while civil commitment statutes have been upheld where they both incapacitate and treat, a state had never been required to refrain from civil commitment merely because no treatment was yet available.[190] The Court noted that a "state could hardly be seen as furthering a 'punitive' purpose by involuntarily confining persons afflicted with an untreatable, highly contagious disease."[191]

Turning next to the Kansas Supreme Court's decision to label the SVP Act punitive because the state had failed to actually treat those committed, the Court reasoned that even if treatment was an ancillary rather than a primary objective, that is still not enough to make the SVP Act punitive and, therefore, criminal in nature.[192] In response to Hendricks's argument that he had not been receiving the statutorily obligated treatment, the Court merely stated that because Hendricks was the first person committed under the SVP Act, the state was not required to have all of its treatment procedures in place.[193] The Court then dismissed that issue by citing the state's claim made at oral argu-

182. *Id.*

183. Allen v. Illinois, 478 U.S. 364, 364 (1986). *See supra* notes 41-46 (holding that civil commitment procedures were civil in nature because of the state's disavowed intent to punish and its emphasis on treatment).

184. *Hendricks*, 117 S. Ct. at 2083 (citing *Allen*, 478 U.S. at 371-72).

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Allen*, 478 U.S. at 364.

190. *Hendricks*, 117 S. Ct. at 2084 (citing *Allen*, 478 U.S. at 373). The Court argued that these offenders should not be released just because treatments have not been effective or that successful treatments are unavailable. *Id.*

191. *Id.* at 2083.

192. *Id.*

193. *Id.* at 2085.

ment that "persons committed . . . [were] . . . now receiving in the neighborhood of '31.5 hours of treatment per week.'"[194]

Upon concluding that the Kansas SVP Act was civil rather than criminal in nature, the Court then dismissed the alleged violations of the double jeopardy and *ex post facto* prohibitions:[195] "Because we have determined that the Kansas Act is civil in nature, initiation of its commitment proceedings does not constitute a second prosecution."[196] Furthermore, the Court failed to find a punitive purpose under the SVP Act, which allowed civil commitment of an individual even after a completed prison term.[197] Citing *Baxstrom v. Herold,*[198] the Court stated that "there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments."[199] The Court dismissed the claims of an *ex post facto* violation on the same basis as it rejected the double jeopardy arguments.[200]

D. The Concurrence

In his concurrence, Justice Kennedy recognized that if Kansas had used treatment as a "sham or mere pretext" to civilly commit Hendricks, then "there would have been an indication of the forbidden purpose to punish."[201] He further "caution[ed] against dangers inherent when a civil confinement law is used in conjunction with the crimi-

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194. *Id.*

195. *Id.* at 2085-86; *see supra* note 161 and accompanying text (discussing why double jeopardy and *ex post facto* are not applicable protections in civil procedures).

196. *Hendricks*, 117 S. Ct. at 2086.

197. *Id.*

198. 383 U.S. 107 (1966) (striking a statute that allowed civil commitment at the end of a prison term without jury review). For further discussion of this case, see *supra* notes 27-28 and accompanying text.

199. *Hendricks,* 117 S. Ct. at 2086 (citing *Baxstrom*, 383 U.S. at 111-12). It should be noted that this excerpt cited from *Baxstrom* was taken out of context by the *Hendricks* Court; therefore, it slightly misstates the holding in *Baxstrom*. The *Baxstrom* Court stated:

> For purposes of granting judicial review before a jury of the question on whether a person is mentally ill and in need of institutionalization, there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments.

Baxtrom, 383 U.S. at 111-12. The *Hendricks* Court omitted the first half of the sentence and quoted the remainder to support the proposition that there is no conceivable basis to distinguish between the commitments pursuant to any purpose. *Hendricks*, 117 S. Ct. at 2086. The *Baxstrom* Court limited the statement to the purpose of jury review, a much narrower proposition than used by the *Hendricks* Court. *Baxstrom*, 383 U.S. at 111-12.

200. *Hendricks*, 117 S. Ct. at 2086. For an explanation of the civil - criminal distinction, see *supra* note 161 and accompanying text.

201. *Hendricks*, 117 S. Ct. at 2086.

nal process, whether or not the law is given retroactive application."[202] Justice Kennedy noted the possibility of the civil commitment system being used to make up for a mistake or pitfall of the criminal system, such as where the prosecution had plea bargained with the defendant and regretted it later.[203] In such a case, the principles of retribution or general deterrence may be implicated, and such a commitment system would have to be invalidated.[204] The final note of concern that the concurrence expressed was the possibility that "mental abnormality . . . [would be] . . . too imprecise a category" to justify civil commitment.[205] If so, the Court's earlier precedents would not uphold the SVP Act.[206]

E. The Dissent

Justice Breyer's dissent in this case was joined by two justices and one justice in part.[207] Upon addressing the substantive due process issue, the three justices agreed that "Kansas . . . [had] . . . acted within the limits that the due process clause substantively sets."[208]

The three dissenters maintained that debates in the psychiatric community over the use of mental abnormality as a standard for civil commitment are irrelevant because the Constitution allows a state to pick one reasonable view over another equally reasonable one: "The psychiatric debate . . . helps to inform the law by setting the bounds of what is reasonable, but it cannot here decide just how States must write their laws within those bounds."[209] They further asserted that the statute's definitions were correctly applied to Hendricks because

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202. *Id.*

203. *Id.* This statement by Justice Kennedy suggests that if the statute had been interpreted as constituting a punishment of Hendricks, he would have struck it down. While he did not agree with the use of sexually violent predator acts as a remedy for regretful plea bargains on the criminal side, it seems troubling that he would allow them to remedy such plea bargains as long as the Court labels them civil instead of criminal. *Id.* This interpretation would allow many states to induce a sexual predator into pleading guilty pursuant to a plea bargain, knowing all along that they will be able to commence civil commitment procedures at the end of the prison sentence anyway.

204. *Id.*

205. *Id.* The concurrence in this case agreed that mental abnormality presently satisfies substantive due process standards. *Id.* Justice Kennedy, however, left open the possibility that further research will show that mental abnormality is too broad and imprecise to justify civil commitment. *Id.*

206. *Id.* at 2087.

207. Justice Ginsburg did not join with the dissent in Part I, which concluded that the civil commitment of Hendricks had comported with substantive due process requirements. *Hendricks*, 117 S. Ct. at 2087-90.

208. *Id.* at 2088.

209. *Id.*

he had a history of inability to control his actions, noting that people like him had been considered insane for purposes of commitment in the past.[210] The dissenters unanimously disagreed with the majority's conclusion that the SVP Act was not punitive and, therefore, was not violative of *ex post facto* prohibitions.[211]

The dissent argued that the SVP Act strongly resembled "traditional criminal punishment" schemes, first noting that both implicated "'secure' confinement . . . against one's will."[212] The dissent further asserted that the SVP Act's basic objective of protecting the public from these offenders is no different from incapacitation, a common and traditional purpose of the criminal law.[213] The dissent maintained that "one of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment."[214] The dissent also criticized the emphasis the majority placed on the Kansas legislature's labeling of the SVP Act as civil, noting that the Court has often looked beyond the civil label in close cases.[215] The dissenters agreed that this was such a case.[216]

After noting all the other similarities between traditional criminal procedures and the SVP Act,[217] the dissent maintained that the most important factor in determining the nature of the SVP Act was the emphasis placed on treatment.[218] Acknowledging that the presence of incapacitation theories is not enough to render a law punitive,[219] the dissent argued that "when a State believes that treatment does exist, and then couples that admission with a legislatively required delay of such treatment until a person is at the end of his jail term (so that further incapacitation is therefore necessary), such a legislative scheme begins to look punitive."[220]

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210. *Id.* at 2088-89. Cases cited by the dissent included *Pearson v. Probate Court*, 309 U.S. 270, 274 (1940) (allowing civil commitment of a person with utter lack of control over sexual impulses), and *In re* Oakes, 8 Law Rep. 122, 125 (Mass. 1845) (Shaw, C.J.) (noting historical civil commitment of those considered furiously mad). *Hendricks*, 117 S. Ct. at 2088-89.

211. *Hendricks*, 117 S. Ct. at 2090.

212. *Id.*

213. *Id.*

214. *Id.* at 2091 (citing United States v. Brown, 381 U.S. 437, 458 (1965)).

215. *Id.*

216. *Id.*

217. *Hendricks*, 117 S. Ct. at 2082-83. The dissent noted that both commitment procedures utilized county personnel, a trial by jury, the beyond a reasonable doubt standard, and psychiatric evaluations. *Id.* at 2091.

218. *Id.* at 2091.

219. *Id.*

220. *Id.* at 2091-92.

The dissent also took issue with the discrepancy between Kansas state legislature's words and its actions.[221] The dissenters agreed with the Kansas Supreme Court and criticized the majority for not giving its decision proper deference.[222] Arguing that the Kansas court's record provided proper support for its conclusion, the dissent analyzed the intent of the legislature in the same way as the Kansas court.[223] Pointing first to the Kansas legislature's failure to provide Hendricks with the treatment that justified his commitment, the dissent said that this failure reflected punitive intentions.[224] Suspicious of the legislature's intentions, the dissent also questioned why a legislature so concerned with treating these individuals would wait "years after the criminal act that indicated its necessity,"[225] or would leave an offender in a prison where the prognosis for rehabilitation is poor.[226] The dissent concluded that "the timing provisions of the statute confirm the Kansas Supreme Court's view that treatment was not a particularly important legislative objective."[227]

The next major argument the dissent advanced to show the unconstitutionality of the Kansas SVP Act was the legislature's lack of consideration of less restrictive alternatives.[228] They noted that "a failure to consider or use 'alternative and less harsh methods' to achieve a non-punitive objective can demonstrate that the legislature's actual intent was to punish."[229] The dissent concluded that "legislation that seeks almost exclusively to incapacitate the individual through confinement would not necessarily concern itself with potentially less restrictive alternatives."[230] The dissent compared the Kansas statute to the sixteen other states with similar legislation[231] and noted that ten of

221. *Id.* at 2092-93.

222. *Id.* at 2092.

223. *Hendricks*, 117 S. Ct. at 2092.

224. *Id.*

225. *Id.* at 2094.

226. *Id.*

227. *Id.* The dissent argued that because treatment was delayed until the very end of the prison sentence, it served as evidence of a motive other than treatment, because a state so concerned with treatment of sex offenders would have initiated such treatment much earlier. *Id.* While the legislature did state that prognosis for treatment in a prison setting is poor, KAN. STAT. ANN. § 59-29a01, it maintained that some treatment would be better than no treatment at all. *Id.*

228. *Hendricks*, 117 S. Ct. at 2095. An example of some less restrictive alternatives may be found in the Washington statute. WASH. REV. CODE ANN. § 71.09.092 (West Supp. 1996-97). These alternatives include conditional release under the supervision of the superintendent of a special commitment center, a community corrections officer. *Id.* Washington also provides secure housing within the community in which the parolee lives. *Id.*

229. *Hendricks*, 117 S. Ct. at 2095 (citing Bell v. Wolfish, 441 U.S. 520, 539 n.20 (1979)).

230. *Id.*

231. *Id.*

these states initiated treatment soon after apprehending the sex offender.[232] Although seven other states do delay civil commitment until after a criminal sentence, six of those require consideration of less restrictive alternatives.[233] The one state that does not consider less restrictive alternative is Iowa, but that state does not apply the statute retroactively.[234] Examining other states' statutes, therefore, confirmed the Kansas Supreme Court's and the dissent's opinions that the Kansas statute was more severe than other sexually violent predator statutes.[235]

The final argument the dissent advanced was the majority's failure to assess the case from the facts as applied to Hendricks.[236] The dissent was not suggesting that Hendricks should not be confined because he was not treatable but because he was not treated.[237] According to the dissent, the state had failed in its statutory obligation to provide treatment to a person who was civilly committed in order to receive treatment.[238] Additionally, the dissent criticized the majority's acceptance of Kansas's argument that Hendricks was now receiving treatment, arguing that the facts were not part of the original record and, therefore, should not have been considered by the Court in its decision.[239]

Applying these findings to its own analysis, the dissent cited *Kennedy v. Mendoza-Martinez,*[240] a case in which the Court listed the following seven factors to help determine whether a statute was punitive for Fifth and Sixth Amendment purposes: (1) whether the sanction involved affirmative restraint; (2) how the sanction had been regarded historically; (3) whether the statute applied to activity already criminal; (4) whether a finding of scienter is needed; (5) how the act relates

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232. *Id.*

233. *Id.* (citing ARIZ. REV. STAT. ANN. § 13-4601, 4606B (West Supp. 1996-97)); CAL. WELF. & INST. CODE ANN. § 6607, 6608 (West Supp. 1997); MINN. STAT. ANN. § 253B.09 (West 1996); N.J. STAT. ANN. 30:4-27.11d (West 1997); WASH. REV. CODE ANN. § 71.09.090 (West Supp. 1996-97); WIS. STAT. ANN. § 980.06(2)(b) (West Supp. 1993-94).

234. *Hendricks*, 117 S. Ct. at 2095 (citing IOWA CODE ANN. § 709C.12). The current version of this statute can be found at IOWA CODE ANN. § 901A (West Supp. 1997).

235. *Hendricks,* 117 S. Ct. at 2095.

236. *Id.* at 2096.

237. *Id.*

238. *Id.* The Kansas statute provides that "treatment of the sexually violent predator is found to be necessary by the legislature." KAN. STAT. ANN. § 59-29a01. Thus, the failure of the hospital to provide the necessary treatment was a breach of its responsibility pursuant to this statute. *See* Youngberg v. Romeo, 457 U.S. 307, 325-26 (1981) (Blackmun, J., concurring) (explaining that commitment based upon a need for treatment, without providing treatment, would not bear a reasonable relation to the purpose of the confinement).

239. *Hendricks,* 117 S. Ct. at 2096-97.

240. 372 U.S. 144, 168-69 (1963).

to traditional aims of punishment; (6) whether a nonpunitive alternative purpose exists; and (7) whether the sanction is excessive in relation to that purpose.[241] Paraphrasing those factors, the dissent applied them to the SVP Act:

> [T]he Act before us involves an affirmative restraint historically regarded as punishment; imposed upon behavior already a crime after a finding of scienter; which restraint, namely confinement, serves a traditional aim of punishment, does not primarily serve an alternative purpose (such as treatment) and is excessive in relation to any alternative purpose assigned.[242]

The dissent concluded that this Act was, in fact, designed to further confine Leroy Hendricks.[243] The dissent stated that the confinement under the SVP Act imposes punishment; therefore, it violates the *ex post facto* prohibition.[244]

III. ANALYSIS

The Court has consistently upheld civil commitment statutes that were enacted pursuant to the state's police power.[245] One must ask, however, whether the SVP Act was created within that permissible civil commitment scheme or whether it serves as an example of the infamous slippery slope, where a state has pushed, and thereby redefined, the constitutional limits originally created by the Court. The two aspects of this decision that possibly redefined the original limits were the acceptance of mental abnormality as a standard for civil commitment and the decision that the SVP Act as applied to Hendricks was civil rather than criminal in nature. The remaining sections of this Note will analyze those two issues.

A. Substantive Due Process and the Use of Mental Abnormality and Dangerousness

"In conjuring up such an idiosyncratic definition of mental disorder, the legislature has gone beyond the bounds of any behavioral dysfunction recognized by mental health professionals and created a hopeless muddle."[246]

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241. *Hendricks*, 117 S. Ct. at 2098 (citing *Kennedy*, 372 U.S. at 168-69).
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.* at 2079-80.
246. John Q. La Fond, *Washington's Sexually Violent Predators Statute: Law or Lottery? A Response to Professor Brooks*, 15 U. PUGET L. REV. 755, 764 (1992) (analyzing the Washington Sexually Violent Predator Act, which served as the guideline of the Kansas SVP Act).

The Due Process Clause of the Fourteenth Amendment to the United States Constitution protects individuals from being deprived of life, liberty, or property by the states without due process of law.[247] The procedural component of due process requires the government to follow proper procedures when infringing on the rights of individuals.[248] Additionally, courts consistently hold that the substantive component of this clause prevents the government from acting in such a way as to "shock[ ] the conscience,"[249] even if done through proper procedures.[250] As Hendricks argued in his brief to the Court, "the core of substantive due process in this Court's modern jurisprudence is that some limitations on individual liberty are beyond the state's authority even if it purports to accompany them with procedural mechanisms that appear to allow fair adjudication."[251] Because civil commitment schemes significantly deprive an individual of his or her fundamental liberty interests, those schemes must comport with the Fourteenth Amendment's due process requirements.[252] Thus, the commitment must bear a reasonable relation to the purpose for which the person was committed and be narrowly tailored to serve that purpose.[253]

1. Mental Illness Does Not Equal Mental Abnormality

While the Court has mandated that involuntary commitment to a mental hospital requires substantive due process protection, little guidance has been offered as to the narrowly tailored schemes that will pass constitutional muster.[254] The *Hendricks* Court allowed for the use of mental abnormality as a standard for the SVP Act's commitment scheme, reasoning that the states have always been free to coin and define terms that will be used in statutes, which in turn, do not

247. U.S. CONST. amend. XIV.

248. Zinermon v. Burch, 494 U.S. 113, 125 (1990).

249. Rochin v. California, 342 U.S. 165, 172 (1952).

250. *Zinermon*, 494 U.S. at 125.

251. Brief for Respondent at 12, Kansas v. Hendricks, 117 S. Ct. 2072 (1997) (No. 95-9075).

252. Jones v. United States, 463 U.S. 354, 361 (1983).

253. *Id.*

254. *See, e.g.*, Vitek v. Jones, 445 U.S. 480, 483 (1980) (holding that procedural safeguards such as notice, an adversary hearing, and counsel must be afforded to the defendant in a civil commitment hearing); Addington v. Texas, 441 U.S. 418, 433 (1979) (noting that the gravity of involuntary civil commitment and the risk of erroneous decisions require a clear and convincing evidence standard for involuntary civil commitment); O'Connor v. Donaldson, 422 U.S. 563, 575 (1975) (requiring evidentiary showing of dangerousness and mental illness in order to involuntarily commit an individual); Baxstrom v. Herold, 383 U.S. 107, 114 (1966) (requiring jury review before involuntary civil commitment); Pearson v. Probate Court, 309 U.S. 270, 274-75 (1940) (upholding statute in part because it provided for procedural due process protections such as right to counsel, judicial review, and right to call witnesses).

need to "fit precisely" with their medical counterparts.[255] The Court added that previous cases have allowed the use of other mental disorders that are similar to the mental illness standard.[256] The purported similarity between these two definitions is, however, inaccurate.

Mental illness requires the existence of a mental disorder, which is defined as a "clinically significant behavioral or psychological syndrome, or pattern that is associated with present distress, disability, suffering, or loss of freedom."[257] In order to accurately label any person as mentally ill, the mental health professional must first diagnose the person as suffering from a mental disorder using diagnostic criteria set forth in the American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV").[258] Second, the professional must determine whether that disorder is "of a type and severity which would merit the label of 'mental illness.'"[259] The SVP Act has managed to escape this evidentiary standard by using the term mental abnormality.

Mental abnormality is not a recognized diagnostic term in the psychiatric community and is not defined in the DSM-IV. Because mental abnormality may encompass those mental disorders that would not warrant civil commitment, it is a more lenient standard and is, therefore, not synonymous with mental illness. Instead, it is merely a legislatively-created term that does not take into account the rigorous evidentiary standards required to properly diagnose mental illness.[260] The variance between the two terms has been the source of debate about whether the use of mental abnormality should be allowed in civil commitment statutes.

The arguments against the use of mental abnormality are best expressed by Professor Stephen Morse.[261] He argues that mental abnormality is "not a recognized diagnostic term [but is] simply a description of the causation of any behavior. For example, mental abnormality might be defined as 'a congenital or acquired condition . . . which predisposes the person to write law review articles, to read law

255. Kansas v. Hendricks, 117 S. Ct. 2072, 2081 (1997).

256. *Id.*

257. Brief of Amicus Curiae Washington State Psychiatric Association in Support of Respondent at 3-4, Kansas v. Hendricks, 117 S. Ct. 2072 (1997) (No. 95-1649) (citing AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS xxiii, xxvii. (4th ed. 1994) (hereinafter "DSM-IV")).

258. *Id.*

259. *Id.*

260. Robert M. Wettstein, *Predators And Politics: A Psychiatric Perspective on Washington's Sexually Violent Predators Statute*, 15 U. PUGET SOUND L. REV. 597 (1992).

261. Stephen J. Morse, *Blame and Danger: An Essay of Preventative Detention*, 76 B.U. L. REV. 113, 137 (1996).

review articles, or to engage in any other activity.'"[262] He further argues that "it is strange, if not incoherent, to define an abnormality by reference to a penal code. If the penal code becomes more forgiving, do the people who now satisfy the definition automatically become 'mentally abnormal?'"[263] In agreement with that view is Professor John Q. La Fond, who states that use of mental abnormality is a "pure tautology, conflating both diagnosis and prediction with a single incident of criminal behavior."[264] Because the term is vague and easily distorted, he is concerned with a legislature abusing or misapplying it in the civil commitment system.[265]

The competing argument is that a legal term does not and should not be required to correspond exactly with its medical counterpart.[266] The Court agrees and has indicated that it will defer to legislative decisions as to statutory terms and definitions.[267] This blind deference to state decisions, however, leaves much room for abuse and substantive due process problems if overly vague terms are used. While this may not be an overriding concern in Hendricks's case because pedophilia is a widely recognized serious mental disorder,[268] the Court failed to articulate a standard for use by states applying current statutes or in drafting future statutes.

In addition, the Court did not instruct the states with regard to how the legislative terms must "fit" with their medical counterparts. The problems posed by this competing view is evident in two main respects. The first problem exists because these statutes require that a person be diagnosed with a mental abnormality, illness, or disorder, and therefore, an expert evaluation and opinion is required by a person who is trained in the mental health field.[269] A lack of compatibility between the terms used by the legal community and those used by the mental health communities could lead to confusion and disagreement.[270] The second problem is that even considering the fact that

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262. *Id.*

263. *Id.*

264. La Fond, *supra* note 246, at 764.

265. *Id.* at 764-65.

266. Robert Teir, *Approaches To Sexual Predators: Community Notification and Civil Commitment*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 405, 421 (1997).

267. Kansas v. Hendricks, 117 S. Ct. 2072, 2082 (1997).

268. *See id.* at 2081 (citing 1 AMERICAN PSYCHIATRIC ASSOCIATION, TREATMENTS OF PSYCHIATRIC DISORDERS 617, 633 (1989); Gene G. Abel & Joanne L. Rouleau, *Male Sex Offenders, in* HANDBOOK OF OUTPATIENT TREATMENTS OF ADULTS 271 (M. Tahse et al. eds., 1990)).

269. Arthur L. Brody & Richard Green, *Washington State's Unscientific Approach to the Problem of Repeat Sex Offenders*, 22 BULL. AM. ACAD. PSYCHIATRY L. 343, 353-54 (1994).

270. *See* Katherine P. Blakey, *The Indefinite Civil Commitment of Dangerous Sex Offenders in an Appropriate Compromise Between "Mad" and "Bad" — A Study of Minnesota's Sexual Psy-*

legal definitions must incorporate legal terms and standards not used in the mental health profession, these legal terms still must comport to standards of reasonableness: standards of reasonableness that are first set by the mental health experts.[271] Thus, when basing civil commitment upon a finding of a mental disorder and dangerousness, logic dictates that approval should be sought from the experts who would later interpret them. Allowing states to draft and define terms without a minimum standard of reasonableness may cause great expansion of the use of civil commitment.[272] Under the Court's analysis, such a slippery slope is very likely due to the Court's acceptance of mental abnormality as a justification for involuntary civil commitment.

2. *The Added Ambiguity of "Dangerousness"*

The Court may have thought that because the mental abnormality must be coupled with a separate finding of dangerousness, there is no room for the abuses described above. A finding of dangerousness, however, is not a widely agreed upon predictor either. As Christopher Slobogin asserts, the use of dangerousness as a legal criterion is often attacked on two grounds: (1) dangerousness should not be considered a justification for intervention in order to protect the public from dangerous individuals; and (2) dangerousness cannot be predicted with sufficient accuracy to allow government intervention.[273]

Those who agree with the use of dangerousness argue that government must be able to incapacitate a dangerous individual before any harm is done.[274] In addressing that argument, Slobogin and other opponents point out that two distinct harms may "result from locking people up on predicted status, rather than [for] acts they have committed."[275] The first harm occurs to the preventatively detained individual: "[C]onfinement of John for something he has not yet done could convince him that he is 'incorrigible' and that further antisocial behavior is inevitable. At the same time, such confinement could eas-

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chopathic Personality Statute, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 227, 260 (1996) (noting problems that courts have had applying medical terminology in a legal setting).

271. *See* Christopher Slobogin, *Dangerousness as a Criterion in the Criminal Process*, *in* LAW, MENTAL HEALTH, AND MENTAL DISORDER 360, 377-79 (1996) (arguing that experts in the field of human behavior are needed in order to adequately judge dangerousness, provided proper procedural mechanisms are in place to limit the testimony only to the likelihood of future dangerous activity).

272. *See Involuntary Commitment of Violent Sexual Predators*, 111 HARV. L. REV. 259, 268-69 (1997) (arguing that the application of mental abnormality as a standard of commitment could eventually allow for the civil commitment of virtually anyone).

273. Slobogin, *supra* note 271, at 365.

274. *Id.*

275. *Id.*

ily lessen his respect for the system, an attitude that has been found to correlate positively with recidivism."[276] The second harm is inflicted on the moral tone of society.[277] When people believe that they can be confined for who they are or for what they are capable of doing, rather than for something they have actually done, that belief takes away any incentive to be law abiding citizens.[278]

Slobogin further disagrees with overemphasizing dangerousness to civilly commit individuals. Citing recent research on the accuracy rates of mental health professionals, statistics have shown that the predictions have only been fifty percent accurate.[279] Another commentator, Michael Tonry, agrees and adds that he has found only a thirty-three percent accuracy rate.[280] Criticizing the court's use of these predictions, Tonry argues that if our system requires proof beyond a reasonable doubt to incarcerate an individual criminally, and clear and convincing evidence to commit civilly, then our system should not justify such commitment on a prediction that is plagued with only a thirty-three percent accuracy rate.[281]

In the conclusion of his article, Slobogin recommends that as long as facts concerning past behavior and personality traits are proven and certain procedures such as periodic review and time-limited intervention are utilized, a proper balance may be struck between public safety, individual rights, and therapeutic goals.[282] All too often, though, that balance is not struck. States need proper guidance and boundaries of reasonableness, which are determined by research within the psychiatric and medical professions. The majority in *Hendricks* has indicated that states are free to draft and define their own statutes according to legal standards only, without adequate regard to the opinions of the medical and mental health experts.[283] Unfortu-

276. *Id.* at 365-66.

277. *Id.* at 366.

278. *Id.*

279. Slobogin, *supra* note 271, at 365.

280. Michael Tonry, *Prediction and Classification: Legal and Ethical Issues*, 9 CRIME & JUST. 367, 395 (1987).

281. *Id.*

282. Slobogin, *supra* note 271, at 379.

283. Kansas v. Hendricks, 117 S. Ct. 2072, 2080-81 (1997). Not only did the Court imply that states are essentially free to draft medically based terms without reference to their medical counterparts, the Court further asserted that a state would be free to define terms pertaining to "areas fraught with medical and scientific uncertainties" because such disagreement between the medical experts affords legislators even wider latitude. *Id.* at 2081 n.3. Taken literally, this even wider area of latitude seems illogical because legislators are, in effect, providing answers to questions that even trained experts have been unable to answer. Should the choice made by the legislature later be proven wrong, a strong argument can be made that commitment based on an erroneous standard constitutes a violation of the defendant's due process rights. *See supra* notes

nately, the legal community is neither qualified nor adequately trained to make such judgments on its own.

Another problem in the dangerousness analysis is another failure by the Court to articulate a minimum required standard. In its own interpretation of the SVP Act, the Court stated that the dangerousness prong requires evidence of past sexually violent behavior.[284] All that seems necessary, therefore, to satisfy the dangerousness prong in an involuntary civil commitment hearing is a showing of the defendant's past crimes. The Court ruled that this was sufficient under due process standards because "[p]revious instances of violent behavior are an important indicator of future violent tendencies."[285]

3. *The Union of "Mental Abnormality" and "Dangerousness"*

Because of the lack of guidance surrounding the application of mental abnormality and dangerousness in civil commitment statutes, the Court has effectively given the states authority to involuntarily commit virtually anyone. For example, these relaxed standards may eventually allow civil commitment of drug addicts because of their tendency to commit robberies in order to obtain money for more drugs. These nebulous standards may also allow for civil commitment of alcoholics because of their tendency to drive under the influence and cause traffic accidents and deaths. While these examples may seem unlikely or far-fetched, a close look at the SVP Act reveals that the Court has allowed for the involuntarily commitment of an individual who is "a *menace* to the health and safety of others."[286] Apparently, a state only needs to select a crime that it considers worthy of involuntary civil commitment and then narrowly tailor the language of the statute to fit only those people. Here, Kansas chose crimes such as rape, indecent liberties with a child, or indecent solicitation of a child.[287] While the aforementioned crimes are considered reprehensible by the average member of society, the same may be said about robbery and alcohol-related traffic deaths.

Scholars who agree with the use of mental abnormality and dangerousness as a standard for civil commitment argue that such abuses would never occur because of judicial review based on constitutional principles such as vagueness and other substantive due process com-

247-53 (explaining why the accuracy of the evidence justifying civil commitment is important to the substantive due process analysis).

284. *Hendricks*, 117 S. Ct. at 2080.

285. *Id.* (citing Heller v. Doe, 509 U.S. 312, 323 (1993)).

286. KAN. STAT. ANN. § 59-a02(b) (1996) (emphasis added).

287. KAN. STAT. ANN. § 59-a02(e)(1-9).

ponents.[288] The Court in this case, however, gave great deference to the Kansas legislature, holding that a state has always been free to draft its own statutory terms and definitions.[289] Because Kansas was able to couch its terms in a purportedly non-punitive statute, the Court adhered to the state's named intent.[290] Such a non-punitive statute is able to avoid violating many constitutional protections.[291] Additionally, once the decision is made to label a statute as civil, that decision will be overturned only upon a showing of the "clearest proof" that the statute is, in fact, criminal.[292] This standard is very hard to satisfy; thus, this great deference given to legislative intent is very hard to override.[293]

B. Turning Punitive Into Non-Punitive: The Role of Justice "Copperfield"

The *Hendricks* Court held that the SVP Act was non-punitive in nature. This section argues that the Court's excessive deference to the stated non-punitive purpose of the statute allowed Kansas, and will allow other states in the future, to give a punitive statute a civil disguise by purporting to provide treatment. This section also argues that treatment is not effective for these offenders and that the Kansas legislature knew this when it enacted this statute, which demonstrates Kansas's intent to find a way to remedy hastily made plea bargains. Finally, this section argues that the Kansas legislature's failure to consider less restrictive alternatives illustrates intent to merely extend a prison term because civil commitment is not the only therapeutic solution for sex offenders.

The Court's decision to label the SVP Act as civil rather than criminal in nature significantly diminished the procedural and constitutional rights to which an individual committed under them would be entitled.[294] As explored by various scholars, "[d]eeply embedded in Anglo-American law . . . is a sharp procedural divide between criminal and civil cases."[295] While the Constitution imposes limitations on

288. For a full discussion of the limitations these protections place on governmental action, see *supra* notes 247-53 and accompanying text.

289. *Hendricks*, 117 S. Ct. at 2081 (1997).

290. *Id.* at 2082.

291. *Id.* at 2085-86.

292. *Id.* at 2082 (citing United States v. Ward, 448 U.S. 242, 248-49 (1980)).

293. *See* text *infra* at IV.B.

294. See *supra* note 161 and accompanying text for further legal analysis of these concepts.

295. Carol S. Steiker, *Punishment and Procedure: Punishment Theory and The Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 777 (1997).

the state such as protections against double jeopardy,[296] *ex post facto*,[297] and burden of proof beyond a reasonable doubt,[298] the Court has held that such protections need not be employed in civil procedures.[299] The determination of whether a statute is civil or criminal in nature is, therefore, highly significant.

As the majority in *Hendricks* noted, determining the nature of a statute "is first of all a question of statutory construction."[300] Then the majority noted that the SVP Act was placed in the civil codes and that its description as a "civil commitment procedure" determined that a civil statute had been created.[301] Although the Court seems to have reached this conclusion easily, Justice Marshall criticized such a method of analysis in his dissent in *Salerno*.[302] "The majority's technique for infringing this right is simple: merely redefine any measure which is claimed to be punishment as 'regulation,' and, *magically*, the Constitution no longer prohibits its imposition."[303] The following sections discuss the shortcomings of the magic performed by the majority in *Hendricks*.

1. Legislative Intent and the Interjected Purpose

The *Hendricks* Court placed great emphasis on the legislature's intent to label the SVP Act civil in nature,[304] but a court's emphasis on legislative intent is often criticized on two grounds. First, it may not always be possible to discern the true intent of the legislature.[305] Because a court places great weight on a statute's label, legislators may purposely couch a punitive statute in civil terms, so that courts would recognize the statutes as civil. Legislative history may be even more indeterminate because a cunning politician may "inject statements intended solely to influence the later interpretation of the statute."[306] The second criticism of the Court's emphasis on the legislature's civil label for the SVP statute is that a Constitution can hardly protect the

296. U.S. CONST. amend. V.

297. U.S. CONST. art I, § 9, cl. 3.

298. *In re* Winship, 397 U.S. 358, 364 (1970).

299. *See* Addington v. Texas, 441 U.S. 418, 428 (1979) (holding that civil commitment does not require proof beyond a reasonable doubt); Kansas v. Hendricks, 117 S. Ct. 2072, 2085-86 (1997).

300. *Hendricks*, 117 S. Ct. at 2081 (citing Allen v. Illinois, 478 U.S. 364, 368 (1980)).

301. *Id.* at 2081-82.

302. United States v. Salerno, 481 U.S. 739, 760 (1986) (Marshall, J., dissenting) (emphasis added).

303. *Id.* (emphasis added).

304. *Hendricks*, 117 S. Ct. at 2081-82.

305. *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1016 (1992).

306. *Id.*

rights of the punished when courts focus on the subjective motivations of the punisher: "The value of these protections would be greatly diminished, if not annihilated, were their applicability dependent on the motives ascribed to the very institution whose powers they are meant to limit."[307]

Perhaps the leading critic in this area is Max Radin, author of *Statutory Interpretation*.[308] He criticized the emphasis placed on the labels made by legislators, arguing that "[t]he chances that of several hundred men each will have exactly the same determinate situations in mind . . . are infinitesimally small."[309] Radin asks this perplexing question: "What gives the intention of the legislature obligating force?"[310] In the realm of separation of powers, the function of the legislature is to "utter[ ] the words of a statute,"[311] while the function of the courts is to interpret those words.[312] Assigning the interpretive role to the legislature infringes upon the court's role.

Further, as the legislature emphasized a concern for Hendricks's needs, particularly treatment, there was no explanation why treatment was stalled for so many years while Hendricks sat in a prison cell, where the prognosis for treatment is poor.[313] While the majority chose not to analyze that inconsistency between the state's actions and the state's words, the dissent argues, and this Note agrees, that a state so overwhelmingly concerned with treating and helping these individuals would have started treatment long ago.[314]

Another failure in the majority's statutory interpretation was the emphasis placed on the objective purpose of the statute, which ignored a crucial analysis of the legislature's subjective intent. While an objective reading of the statute may cause a reasonable person to believe that the legislature actually wanted to treat Hendricks, the dissent articulated very persuasive arguments that Hendricks was really incapacitated under the guise of treatment.[315]

Despite the arguments of various scholars in the area of statutory construction, a defendant may be able to overcome the Court's deci-

307. Maria Foscarinis, *Toward a Constitutional Definition of Punishment*, 80 COLUM. L. REV. 1667, 1673 (1980).

308. 43 HARV. L. REV. 863 (1930).

309. *Id.* at 870.

310. *Id.* at 871.

311. *Id.* at 871-72.

312. *Id.* at 871.

313. KAN. STAT. ANN. § 59-29a01 (1996).

314. Kansas v. Hendricks, 117 S. Ct. 2072, 2093-94 (1997).

315. *See supra* notes 218-35 and accompanying text (discussing the dissent's rationale for concluding that the Kansas legislature really did not envision treatment as the sole purpose of the SVP Act).

sion to label a statute civil by satisfying the "clearest proof" doctrine.[316] The "clearest proof" doctrine provides that a court will negate a legislature's intent to deem a measure non-punitive only upon the a showing of clearest proof that the statute is, in fact, mislabeled.[317] First adopted in *Flemming v. Nestor*,[318] the clearest proof doctrine has developed into nearly an irrebuttable presumption favoring the legislature.[319] This test, as applied to a case like *Hendricks*, has been recently reformulated into what is referred to as the Ward-Mendoza test.[320]

According to scholar Gregory Porter, the Ward-Mendoza test should be applied to defendants who seek protections traditionally limited to criminal proceedings.[321] Here, Hendricks argued for protections against double jeopardy and *ex post facto*. The first prong of this test requires a court to discern whether the statute is civil or criminal by looking to the express language of the statute.[322] Once a decision is made to label a statute civil, it may be overcome only by a showing of "the clearest proof."[323] In determining whether this showing has been made, courts generally rely on the seven factors articulated by the *Hendricks* dissent.[324] The dissent determined that the facts in *Hendricks* overcame this presumption.[325] Since the creation of this test, however, a majority of the Court has never found such a situation.[326] This raises the question of whether Hendricks really had a chance against the Kansas legislature.

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316. United States v. Ward, 448 U.S. 242, 248-49 (1980).

317. *Id.*

318. 363 U.S. 603 (1960).

319. *See supra* notes 168-74 and accompanying text (summarizing the how the Court applied this test in *Hendricks*).

320. Gregory Y. Porter, *Uncivil Punishment: The Supreme Court's Ongoing Struggle With Constitutional Limits on Punitive Civil Sanctions*, 70 S. CAL. L. REV. 517, 550 (1997).

321. *Id.*

322. *Id.*

323. United States v. Ward, 448 U.S. 242, 249 (1980) (quoting Flemming v. Nestor, 363 U.S. 603, 617-21 (1960)).

324. Kansas v. Hendricks, 117 S. Ct. 2072, 2098 (1997) (citing Kennedy v. Mendoza, 372 U.S. 144, 168-69 (1963)). See *supra* notes 240-44 and accompanying text for a discussion of this case and application of the seven factors.

325. *Id. Hendricks*, 117 S. Ct. at 2095.

326. *See* Mary M. Cheh, *Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinctions*, 42 HASTINGS L.J. 1325, 1358 (1991) (explaining that since the case was decided, the Court has never used the factors to find that a legislative scheme is criminal rather than civil in nature).

2. Treatment versus Punishment

a. The Treatment Disguise as Applied to Hendricks

In its brief discussion of the distinction between treatment and punishment, the majority argued that the SVP Act was civil in nature because Kansas cited treatment of sex offenders as its primary purpose.[327] The Kansas Supreme Court, as well as the *Hendricks* dissent, called treatment an attempt to disguise a criminal statute.[328] The *Hendricks* Court countered that even if treatment was not the primary goal of the SVP Act, that was still insufficient to render the statute punitive.[329] This holding, however, seems inconsistent with earlier cases, which placed emphasis on the actual treatment the prisoners received. For example, in *Jackson v. Indiana*,[330] the Court held that the nature of a psychiatric commitment must bear some relation to its purpose.[331] In *Allen*,[332] the Court emphasized that the civil label was contingent upon prisoners actually receiving treatment.[333] Likewise, in *Foucha*,[334] the Court held that allowing a "disorder for which there is no effective treatment"[335] to serve as the basis for involuntary commitment was only a step away from allowing detention based on dangerousness alone.[336] Finally, as Justice Blackmun stated in *Youngberg*,[337] when a state bases the "deprivation of liberty . . . upon a promise of treatment, [it] ineluctably has committed the community's resources to providing minimal treatment."[338] This line of cases illustrates that the Court was previously concerned with whether these individuals were actually receiving the required treatment.

Conversely, the *Hendricks* Court held that the state does not need to show that it has entered into treatment contracts or that it has hired any qualified staff to administer the treatment.[339] Additionally, the

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327. *Hendricks*, 117 S. Ct. at 2085-86.

328. *Id.*; *In re* Hendricks, 912 P.2d 129, 136 (Kan. 1996).

329. *Hendricks,* 117 S. Ct. at 2084.

330. 406 U.S. 715 (1972).

331. *Id.* at 738.

332. Allen v. Illinois, 478 U.S. 364 (1986). For further discussion of this principle, see *supra* notes 41-46 and accompanying text.

333. *Allen*, 478 U.S. at 373.

334. Foucha v. Louisiana, 504 U.S. 71 (1992). *See supra* notes 47-51 (discussing the requirements set forth by the *Foucha* Court in order to civilly commit a defendant).

335. *Foucha*, 504 U.S. at 82.

336. *Id.* at 82-83.

337. 457 U.S. 307 (1982).

338. *Id.* at 326 (Blackmun, J., concurring) (quoting Romeo v. Youngberg, 644 F.2d 147, 168 (3d Cir. 1980)).

339. Kansas v. Hendricks, 117 S.Ct. 2072, 2093 (1997). At oral argument, the prosecution stated that committed offenders had been receiving approximately 31.5 hours of treatment per week. *Id.* at 2085. Part of Hendricks's argument involved the fact that he had not been receiving

state may stall the purported treatment for at least ten months (presumably longer if the prisoner does not sue)[340] and still be found within the minimum standards of treatment requirement.[341] Such a blatant disregard for the treatment actually provided for Hendricks sends a strong message to other states that providing treatment is not as important as simply saying that treatment is the legislation's purpose. This will allow a state to provide very little treatment and be unconcerned about its effectiveness. This will effectively allow states to succeed in extending a previous prison sentence without helping the offender.

b. The Highly Questionable Effectiveness of Treatment: The Chocolate Cake Problem

The controversial debate over the effectiveness of treatment was most effectively analogized by retired FBI agent John Douglas, who worked as a criminal profiler in the Investigative Support Unit at Quantico: "This is the way my co-workers, associates, and I view rehabilitation of sexual predators, particularly serial sexual predators . . . ."[342]

> You've baked this chocolate cake which smells great and looks terrific, but as soon as you bite into it you realize something is very wrong.
>
> Then you remember, "Oh yeah, in addition to the eggs and flour and butter and cocoa, . . . I recall mixing in some axle grease from my workshop in the garage. That's the only problem with the cake—the axle grease! If I can just figure out a way to get the axle grease out of the cake, it would be perfectly fine to eat . . . ." The fact of the matter is that in the vast majority of cases, the urges, the desires, the character disorders that make them hurt and kill innocent [people] are so deeply ingrained in the recipe of their makeup that there is no way to get out the axle grease.[343]

According to many mental health experts, the ability to effectively treat sex offenders like Hendricks is highly doubtful. One supporter of Douglas's conclusion is Dr. Robert Wettstein, who argues that the problematic nature of these treatment programs often leads to the conclusion that these programs will essentially become indeterminate

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treatment until after he filed suit. *Id.* The dissent vehemently argued that the majority should not have gone beyond the record in deciding the case and pointed to the fact that it should have been decided at the time suit was filed. *Id.* at 2093, 2096.

340. The dissent noted in its argument that Hendricks sat in the treatment facility for ten months and still had not received any treatment. *Id.* at 2093.

341. *Id.*

342. JOHN DOUGLAS & MARK OLSHAKER, JOURNEY INTO DARKNESS 362 (1997).

343. *Id.*

preventative detention, rather than therapeutic detention.[344] While supporters of civil commitment statutes argue that these offenders are treatable, Wettstein maintains that effective treatment cannot and does not occur after a lengthy prison sentence.[345]

He argues that because the treatment offered under these statutes will be initiated years after the underlying offense, this delay "begins to permit opportunities for significant distortions and defenses by the offender."[346] He further argues that a passage of time causes memory loss and poor recollection of the underlying offenses.[347] Wettstein then adds that the violent, threatening atmosphere of a correctional facility socializes an offender into never showing weakness or vulnerability and dissuades him from discussing his crimes, especially those involving the rape and murders of children.[348] This socialization works in direct opposition to the objectives of a treatment session, where an offender is encouraged to discuss his crimes and his feelings in relation those crimes.[349]

Wettstein's strongest argument involves the fact that most of these offenders are the "end of the line" offenders who have been life-long sexual predators who have already failed in previous treatment programs and who have persistently succeeded in denying their offenses or responsibility for them.[350] The first step toward any effective treatment is a willing participant in the treatment program.[351] Because all commitments under these statutes are involuntary, the offender, at least at the outset of this treatment, would not be a willing participant. Then, if the offender never agrees to treatment, the civil commitment will nonetheless turn into a permanent commitment.[352] Also, as Douglas argues, if these offenders really cannot be considered "cured" enough to be released into society, this indefinite civil commitment will turn into a permanent commitment.[353] Permanent commitment,

344. Wettstein, *supra* note 260, at 614.

345. *Id.*

346. *Id.* at 617.

347. *Id.*

348. *Id.*

349. *Id.*

350. Wettstein, *supra* note 260, at 616.

351. *See* Marvin S. Swartz et al., *The Ethical Challenges of a Randomized Controlled Trial of Involuntary Outpatient Commitment*, 24 J. MENTAL HEALTH ADMIN. 35, 36 (1997) (stating that mental health professionals generally disapprove of forced treatment).

352. *See* DOUGLAS & OLSHAKER, *supra* note 342, at 362. This problem has already materialized in state cases following the *Hendricks* case. *See* Montana v. Woods, 945 P.2d 918, 922 (Mont. 1997) (denying offender petition for release from hospital, partially because he had refused treatment); State v. Zanelli, 569 N.W.2d 301, 310 (Wis. 1997) (denying petition for release after civil commitment due to unsatisfactory progress in treatment).

353. DOUGLAS & OLSHAKER, *supra* note 342, at 362.

instead of being an unfortunate by-product of these civil commitment statutes, was probably the actual goal of the legislature when it drafted the SVP Act.[354]

3. *The Failure to Consider Less Restrictive Alternatives*

The dissent in *Hendricks* raised the argument that the Court and Kansas failed to consider less restrictive alternatives, noting that precedent holds that "failure to consider or to use, 'alternative and less harsh methods' to achieve a non-punitive objective can help to show that the legislature's 'purpose was to punish.'"[355] As revealed by its research of seventeen states, the dissent in *Hendricks* found that only seven of them delay treatment until after the offender has completed his prison sentence.[356] Six of those seven states, however, require consideration of less restrictive alternatives to involuntary commitment.[357] Wisconsin requires the court to consider supervised release of the defendant and specifically provides that "[t]he department shall arrange for control, care, and treatment of the person in the least restrictive manner . . ."[358] Minnesota also requires consideration of voluntary outpatient care, voluntary admission to a treatment facility, or appointment of a guardian or conservator.[359] The California statute requires the court to consider supervised release into the community,[360] and the Arizona statute provides that less restrictive alternatives shall be considered.[361] Thus, Kansas departs significantly from these statutory schemes by failing to consider less restrictive alternatives.

Another alternative to civil commitment is to treat the offenders while they serve their criminal sentence. The Kansas legislature noted that treatment for these offenders was delayed because prison is a

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354. *See* Hon. Tom Malone, *The Kansas Sexually Violent Predator Act - Post Hendricks*, 67 J. KAN. B. ASS'N 36, 37 (1998) (noting several Kansas state legislators who advocated the statute as a way to "keep dangerous sex offenders confined past their prison sentence" and that the state could not continue to "let these animals back into our communities"). Thus, the importance of providing adequate and prompt treatment for these offenders was not the reason for the statute's passage.

355. Kansas v. Hendricks, 117 S. Ct. 2072, 2095 (1997) (citing Bell v. Wolfish, 441 U.S. 520, 539 n.20 (1979)).

356. *Id.*

357. *Id.*

358. WIS. STAT. ANN. § 980.06(2)(b) (West Supp. 1997).

359. MINN. STAT. ANN. § 253B.09 subd. 1 (West Supp. 1998).

360. CAL. WELF. & INST. CODE ANN. § 6608(a) (West Supp. 1998).

361. ARIZ. REV. STAT. ANN. § 13-4606(B) (West Supp. 1997). New Jersey and Washington also require consideration of less restrictive alternatives and impose similar requirements. N.J. STAT. ANN. 30:4-27.11d (West 1997); WASH. REV. CODE ANN. § 71.09.090 (West Supp. 1998).

poor setting for treatment,[362] but that is arguably true only in traditional group therapy treatments. Physicians in the medical community have been developing and advocating alternatives to the unsuccessful cognitive therapies.[363] For example, Dr. Daniel Icenogle argues for the biological treatments of male sex offenders.[364] One example is surgical treatment in the form of stereotaxic neurosurgery, in which doctors are able to locate areas of the brain where large amounts of sex hormones accumulate and destroy them.[365] The result has been described as a drastic change in the person's sexual behavior and fantasies.[366]

Another type of biological treatment is the use of hormone therapy.[367] This therapy, which is also known as chemical castration, is most commonly performed with medroxyprogesterone acetate ("MPA").[368] This hormone lowers serum testosterone, which is the hormone directly responsible for sexual behavior and aggressiveness.[369] In a study performed by Johns Hopkins Sexual Disorders Clinic, the recidivism rate among a group of 600 offenders was less than ten-percent.[370]

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362. KAN. STAT. ANN. § 59-29a01 (1996).

363. For discussion of this alternative treatment and its use in California, see Kay-Frances Brody, *A Constitutional Analysis of California's Chemical Castration Statute*, 7 TEMP. POL. & CIV. RTS. L. REV. 141 (1997) (arguing that chemicals have been found to be successful on certain types of offenders but that the California statute may be facially unconstitutional); Mark J. Neach, *California is on the "Cutting Edge": Hormonal Therapy (a.k.a. "Chemical Castration") is Mandated for Two-Time Child Molesters*, 14 T.M. COOLEY L. REV. 351 (1997) (stating that the therapy may be successful on certain types of sex offenders).

364. Daniel L. Icenogle, *Sentencing Male Sex Offenders to the Use of Biological Treatments*, 15 J. LEGAL MED. 279 (1994).

365. *Id.* at 282. These surgeries have proven to be promising, yet because of their highly sensitive nature, they were limited to designated research centers, where physicians still do not fully understand why the treatment is successful on some offenders. *Id.* at 282-83. Although it is a successful treatment in some cases, it is still being refined. *Id.*

366. *Id.* at 283.

367. *Id.* at 284.

368. *Id.* The treatment usually consists of weekly injections and is often used in conjunction with a form of talk therapy. *Id.* at 284-85. A minority of patients experienced side effects such as weight gain, mild lethargy, cold sweats, hot flashes, shortness of breath, and lessened testes size. *Id.* While not all the sex offenders responded to the treatment, of those who did respond to the MPA, none had resumed their paraphilic behavior. *Id.* at 286. Additionally, while these side effects may prevent mandated use of these drugs on sexual predators because of constitutional concerns, these alternatives should be offered to the offender after all the side effects are fully disclosed.

369. *Id.* at 283-84.

370. Icenogle, *supra* note 364, at 285 (citing Berlin & Malin, *Media Distortion of the Public's Perception of Recidivism and Psychiatric Rehabilitation*, 148 AM. J. PSYCHIATRY 1572, 1573 (1991)).

Judicial acceptance of these treatment methods has been slow. Many biological treatments may be considered a violation of the Eighth and Fourteenth Amendments if mandated;[371] however, purely voluntary participation in the biological treatment would not involve the same concerns.[372] Because they can be constitutional, these alternatives should be seriously considered as less restrictive alternatives in civil commitment statutes. Had this type of treatment been offered to Hendricks during the ten years he was in prison, he may have been ready to return to society at the end of his prison sentence. Most offenders would rather try hormone therapy than risk being indefinitely civilly committed.[373] Furthermore, allowing sexual predators a choice in treatment would likely increase their willingness to participate because they would feel like they have some control over what happens and that they are not being forced to undergo treatment. The aforementioned studies have consistently shown that willingness to participate facilitates treatment.[374] This would more effectively advance the alleged purpose of the SVP Act.[375] Although the public disgust for these types of offenders leads one to ask why the opinions of these sexual predators should matter, it must be remembered that the purported purpose of the sexual predator statutes was to treat these offenders, not to punish them. If studies have shown that treatment is more effective when performed on willing participants, then these offenders should be consulted about their treatment options.

Finally, many states already have statutes that allow for further imprisonment of sexual predators. As noted by the Supreme Court of Kansas, the state could have had tripled Hendricks's sentence under the Habitual Criminal Act or sentenced him with the maximum sentence rather than the minimum sentence.[376] These sentences also

371. *See* Brody, *supra* note 363, at 156-57 (arguing that the Court has long recognized a liberty interest in being free from unwanted medical treatment). *See also* Skinner v. Oklahoma, 316 U.S. 535 (1942) (invalidating an Oklahoma statute that provided for the sterilization of habitual criminals who had been convicted three times of felonies involving crimes of moral turpitude).

372. Brody, *supra* note 363; Neach, *supra* note 363.

373. *See generally* Jeffrey A. Klotz, *Sex Offenders and the Law: New Directions*, *in* MENTAL HEALTH AND LAW: RESEARCH, POLICY, AND SERVICES 257, 266-67 (1986) (advocating that incarcerated sex offenders should be encouraged to seek treatment in order to avoid civil commitment after their sentences, thus giving them a choice in their treatment). Support for this assertion exists in cases such as the one argued by Jeffrey Morse, a convicted child molester, who recently succeeded in his fight to be surgically castrated. Janan Hanna, *Admitted Molester Surgically Castrated*, CHI. TRIB., Jan. 21, 1998, at 1. He stated that he did it for himself so that he could finally get control of his life. *Id.* He said he hoped that the judge would consider his willingness to treat himself when imposing sentence. *Id.*

374. *See supra* notes 363-70 and accompanying text.

375. *See supra* notes 109-10 and accompanying text.

376. *In re* Hendricks, 912 P.2d 129, 137 (Kan. 1996).

could have run consecutively, thereby effectively imprisoning Hendricks for the rest of his life.[377] Instead, the prosecution chose to plea bargain with Hendricks by dismissing one of his charges and recommending only the minimum sentence instead of finding Hendricks a habitual criminal under the Habitual Criminal Act.[378] Had the prosecution properly utilized the options it had at its disposal, it would not have had to resort to involuntary civil commitment in order to protect society.

IV. IMPACT

A. *Potential Abuse of Involuntary Civil Commitment Statutes*

Because of the staggering impact of *Hendricks*, many issues are left unanswered by the Court, and the debate over the constitutionality of these statutes is far from finished. Currently, only seven states have sexually violent predator laws, and in light of the *Hendricks* decision, thirty other states are considering similar statutes.[379]

The most troubling issue in this case is the fact that these statutes will undoubtedly be applied to other criminals. While the *Hendricks* Court did not address the extension of involuntary civil commitment schemes to other criminals, the Court upheld the statute partially because it was narrowly limited to a group of specific offenders, stating that "this admitted lack of volitional control, coupled with prediction of future dangerousness, adequately distinguishes Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings."[380] The troubling fact remains, however, that this same argument can be advanced in support of the involuntary civil commitment of alcoholics or drug addicts. First, drug addicts and alcoholics suffer from serious mental and physical cravings for the drug.[381] These cravings can easily render them unable to control their actions.[382] Dangerousness, the second prong of the test, can be satisfied if the state is able to show that the alcoholic has driven while under the influence of alcohol or that the drug

377. *Id.*

378. *Id.*

379. Tom Browell, *Close to Home*, WASH. POST, Sept. 28, 1997, at C8; *see also* Matthew Purdy, *Wave of New Laws Seeks to Confine Sexual Offenders*, N.Y. TIMES, June 29, 1997, at 1 (noting one legislature who "hurriedly passed its own version of the law" and that officials in several other states are planning to do the same).

380. Kansas v. Hendricks, 117 S. Ct. 2072, 2081 (1997).

381. Steven E. Hyman, *A Man with Alcoholism and HIV Infection*, JAMA, Sept. 13, 1995, at 19-20.

382. *Id.*

addict had ever stolen to support his or her habit.[383] The state could bring in an expert to testify about the nature of their physical cravings for the drug and subsequently argue that the "likelihood of engaging in repeat acts of . . . [driving under the influence, robbery or burglary] . . . are high."[384]

While statutes providing for involuntary civil commitment of drug addicts or alcoholics have not been introduced or passed by state legislatures, SVP Acts like the one analyzed in *Hendricks* have already been used to involuntarily civilly commit a once-convicted rapist.[385] Naegele was classified as a sexual predator under Ohio law after his conviction for one count of rape and one count of kidnapping.[386] Naegele appealed, arguing that his history of one sexual crime was insufficient evidence to classify him as a sexual predator.[387] This ruling was upheld at the appellate level; therefore, it may be inferred that this form of involuntary commitment has already been extended to include civil commitment of one-time sexual offenders.[388] A comparison of the crime committed by Naegele and the crimes committed by Hendricks reveal a substantial difference in both the number of crimes committed and the types of crimes committed.[389] Nonetheless, the same statute originally intended to allow for the involuntary civil commitment of predators like Hendricks has been expanded to allow such commitment of any type of sexual offender.[390] It may only be a mat-

383. The *Hendricks* Court noted that "commitment proceedings can be initiated only when a person 'has been convicted of or charged with a sexually violent offense . . . .'" *Id.* at 2080 (quoting KAN. STAT. ANN. § 59-29a02(a) (1994)). This language could be altered to allow commitment of alcoholics if the alcoholic has been convicted or charged with an alcohol-related offense involving a motor vehicle or to commit drug addicts if the drug addict has been convicted or charged with a drug-related offense.

384. This language is found in the Kansas SVP Act and was accepted by the *Hendricks* Court as satisfying due process concerns. KAN. STAT. ANN. § 59-29a01; *Hendricks*, 117 S. Ct. at 2081. This extension of civil commitment is highly likely in light of recent studies linking drugs and crime. Elizabeth Shogren, *Clinton Looks to End the Crime-Drug Link*, TIMES UNION, Jan. 12, 1998, at A8; *see* Dan Janison, *Treating Addicts In Jails: Additions Target Drug-Crime Link*, NEWSDAY, Nov. 11, 1997, at A35 (reporting on prisons that are setting up addiction treatment programs for current prisoners and former inmates seeking continued treatment once freed).

385. State v. Naegele, No. CA97-04-043, 1998 LEXIS 1152, at *1 (Ohio App. 1998).

386. *Id.* at *5. The Ohio sexual predator statute defines a sexual predator as "a person who has been convicted of or pleaded guilty to committing a sexually oriented offense and is likely to engage in the future in one or more sexually oriented offenses." OHIO REV. CODE ANN. § 2950.09(C)(1) (Anderson 1997).

387. *Naegele*, No. CA97-04-043, 1998 LEXIS 1152, at *1.

388. *Id.*

389. *See supra* notes 115-25 (tracing Hendricks's criminal history).

390. *See supra* notes 104-06 (tracing the passage of the Sexual Predator Act in Washington). While it may be argued that expansion of the SVP Act to one-time sexual offenders, alcoholics, or drug addicts may be socially desirable as well, the arguments were advanced to show that these statutes are too broadly drafted and allow for extension beyond what the *Hendricks* Court

ter of time before the Court will begin hearing cases where states have extended civil commitment statutes to another type of criminal.

While the SVP Act purports to utilize non-punitive goals such as treatment and the protection of society under its police powers, those goals are overshadowed by the traditional criminal justice goals of incapacitation and rehabilitation.[391] This is especially evident, considering the fact that Kansas initially had little concern for treatment.[392] The very purpose that has justified the civil commitment of Hendricks remains highly debated in the mental and medical communities.[393] There is simply no conclusive proof that the current treatment methods employed are successful or effective.[394] The purpose of civil commitment may be jeopardized absent consideration of less restrictive alternatives.[395] Kansas concedes that treatment in a prison setting is poor; therefore, an argument in favor of civil commitment is extremely weak and unconvincing when treatment is the purported goal, but other possibilities have not been considered or attempted.

B. Proposed Legislation

This Note does not suggest that sexual predators should be allowed to roam freely among society, especially if evidence indicates that they are untreatable by current methods. Rather, this Note attempts to bring the problems of the current sexual predator statutes to the attention of legislators and to propose alternative methods of handling sexual predators.

One possible scheme could proceed in a manner similar to the civil commitment of a defendant found not guilty by reason of insanity. Under this scenario, if a state receives notice of crimes allegedly committed by a sexually violent predator, the state would be able to file a petition of review of that individual's criminal record. If a judge determines that probable cause exists to find that the individual is a sexual pedophile, that person would undergo a court-ordered evaluation by a state psychiatric professional. If that professional decides that

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may have anticipated. Additionally, once involuntary civil commitment for drug addicts and alcoholics begins, commitment for other types of criminals will most likely follow; hence, the slippery slope begins.

391. See *supra* notes 213-39 and accompanying text for a discussion of the facts that support the argument that incapacitation was the true intent behind the SVP Act.

392. See *supra* notes 221-27 and accompanying text for a discussion of points raised by the *Hendricks* dissent that show lack of concern for treatment.

393. *See supra* notes 342-54 and accompanying text.

394. *See supra* notes 342-54 and accompanying text.

395. *See supra* notes 355-78 and accompanying text (discussing the various alternatives available in the treatment of sexual pedophiles).

the individual is a sexual pedophile, then he would be tried before a jury to determine this beyond a reasonable doubt. If a jury returns such a verdict, that predator will be committed indefinitely to a mental institution. The prisoner would be subject to continued treatment, including biological treatments if the predator so chooses, and yearly periodic review of his progress. The prisoner would also be able to petition on a regular basis for his release, and he would have the burden of proving that he is fit to be released back into society.[396]

While this procedure sounds very similar to the one employed by the state of Kansas in *Hendricks*, the critical difference is that this sequence occurs in lieu of a criminal trial. Thus, the constitutional issues of double jeopardy and *ex post facto* are avoided.[397]

An alternative proposal to keep these predators off the streets is to impose life sentences without the possibility of parole. This proposal is considerably cheaper for taxpayers than the civil commitment scheme, and if it is proven that the treatment methods are not successful enough to warrant continued use, this proposal would also be the most logical.[398] The prosecution had the means at its disposal to effectively keep Hendricks behind bars for the rest of his life.[399] Instead, the state struck a plea bargain with Hendricks and returned ten years later to involuntarily civilly commit him.[400] While Kansas still asserted that its purpose in using the SVP Act was to provide treatment for Hendricks, it is equally probable that the state merely realized its mistake and then sought to remedy it. Imposing remedies to make up for the shortcomings of the criminal justice system does not comport with the understood principles of our system of government.[401]

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396. Some may argue that this proposed scheme would be too costly for taxpayers. Under schemes currently utilized by Kansas and most other states, the taxpayers first foot the bill for a lengthy prison sentence, which normally costs taxpayers approximately seventy-three dollars per day. Susan Carney, *Sexual Predator Bill Draws No Public Support, Sponsor Plowman Disappointed*, BANGOR DAILY NEWS, Jan. 21, 1997, at 1. Then, after that prison sentence, the taxpayers pay for treatment in the mental hospital. *Id.* Under this proposal, the taxpayer would pay for only one period of confinement.

397. While some may argue that alternatives to statutes such as the SVP Act are unnecessary because the Court has held them to be constitutional, the purpose of this Note was to demonstrate that the decision is wrought with uncertainties and has opened the door to many problems and abuses.

398. *See* Lally, *supra* note 1, at C4 (noting that hospitals cost typically four times as much as traditional prison). *See also* Ardy Friedberg, *Hospital Workers Fear Future Is Up For Bids, Privatization Scheduled For Center For Mentally Ill*, SUN-SENTINEL, Jan. 30, 1997, at 1B (noting that the cost of care per person at the state mental hospital is $85,000 per year).

399. *See supra* notes 376-78 and accompanying text.

400. Kansas v. Hendricks, 117 S. Ct. 2072, 2078 (1997).

401. In his concurrence, Justice Kennedy addressed this concern when he noted that civil commitment should not be used to impose punishment after the state had made an "improvident plea bargain on the criminal side." *Id.* at 2087. The fact that Hendricks had received a plea

V. CONCLUSION

The debate surrounding the use of sexually violent predator statutes is far from finished. The Court's decision in *Kansas v. Hendricks* was highly anticipated and will undoubtedly be used as support for the creation of sexual predator statutes in many other states. It appears that this decision is a reflection of overwhelming public pressure on the Court, akin to the public pressure exerted on the state of Washington.[402] As this Note has illustrated, several constitutional infirmities still remain; therefore, the Court's decision in *Hendricks* should not be blindly relied upon by other states considering these statutes. Instead, statutes should be created that allow *either* the criminal justice system *or* the civil commitment system to be utilized, not both. Blind reliance on the language used in the SVP Act will inevitably lead to indefinite civil commitment of alcoholics or drug addicts after they serve jail time.[403] If society considers the crimes committed by alcoholics and drug addicts as reprehensible as those of pedophiles and other sex offenders, past experience indicates that statutes to civilly commit them could be upheld.[404]

Kimberly A. Dorsett

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bargain in this case did not concern Justice Kennedy because he believed that the SVP Act did not constitute punishment. *Id.* Justice Kennedy did state that if mental abnormality is later shown to be too imprecise a category to justify civil commitment, then he would not validate the SVP Act. *Id.* As this Note has argued, mental abnormality is often regarded as being overly vague and too broad. *See supra* notes 261-65 and accompanying text. This suggests that the decision stands on unstable ground.

402. *See supra* notes 104-06 (describing the public outcry under which the Washington sexual predator statute was passed).

403. *See supra* notes 380-90 (discussing the statutory variations that may lead to this type of civil commitment).

404. See *supra* notes 104-06 for a discussion of the steps taken by protesters to ensure that the state of Washington did something about pedophiles.